TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 523.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED SEPTEMBER 2, 1920.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

a IN THE SUPREME COURT OF THE UNITED STATES.

The United States of America, plaintiff in error,
vs.
Boze Yuginovich and Boze Yuginovich (indicted as Boze Yuginni and Cousin Boze Yuginni), defendants in error.

Names and addresses of the attorneys of record.

Mr. Lester W. Humphreys, United States attorney, and Mr. Austin F. Flegel, jr., assistant United States attorney, 304 Old Post Office Building, Portland, Oregon, for the plaintiff in error.

Mr. Barnett H. Goldstein, 1110 Wilcox Building, Portland, Oregon, for the defendants in error.

1 IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, indicted as Boze Yuginni and Cousin Boze Yuginni, defendants in error.	At law. No. C.–8905.

United States of America to Boze Yuginovich and Cousin Boze Yuginovich, greeting:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States to be holden in the city of Washington, within sixty days from the date hereof, to-wit: On or before the 24th day of September next, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of Oregon, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against plaintiff in error, as in said writ of error mentioned ought not to be corrected and speedy justice be done to the parties in that behalf.

Given under my hand in the city of Portland, in the State of Oregon, he 26th day of July, in the year of our Lord one thousand nine hundred twenty.

R. S. BEAN,
Judge of the District Court of the United States for the District of Oregon.

2 UNITED STATES OF AMERICA,
District of Oregon, ss:

Due, legal, and timely service of the within notice is hereby acknowledged by receipt by me of copy thereof this 26th day of July, 1920, at Portland, Oregon.

BARNETT H. GOLDSTEIN,
Attorney for Defendants in Error.

3 (Indorsed:) No. e-8905. 28-94. In the District Court of the United States for the District of Oregon. United States of America vs. Boze Yuginovich and Cousin Boze Yuginovich, at law, No. C 8905. U. S. District Court, District of Oregon. Filed July 27, 1920. G. H. Marsh, clerk.

4 In the Supreme Court of the United States of America.

United States of America, plaintiff in error, vs. Boze Yuginovich and Cousin Boze Yuginovich, indicted as Boze Yuginni and Cousin Boze Yuginni, defendants in error.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the district court before the Honorable R. S. Bean, one of you, between United States of America, plaintiff and plaintiff in error, and Boze Yuginovich and Cousin Boze Yuginovich, defendants and defendants in error, a manifest error has happened to the great damage of the said plaintiff in error, as by petition doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington within sixty days from the date hereof, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

5 Witness the honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 26th day of July, 1920.

[SEAL.]

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

Allowed by—
R. S. BEAN,
United States District Judge.

6 (Indorsed:) In the District Court of the United States for the District of Oregon. United States of America vs. Boze

Yuginovich and Cousin Boze Yuginovich. At law, No. C 8905. Writ of error.

7 In the District Court of the United States for the District of Oregon.

March term, 1920.

Be it remembered that on the 18th day of June, 1920, there was duly filed in the District Court of the United States for the District of Oregon an indictment in words and figures as follows, to wit:

8 In the District Court of the United States for the District of Oregon.

United States of America vs. Boze Yuginni and Cousin Boze Yuginni, defendants.

Indictment for violation of sections 3257, 3279, 3281, and 3282, United States Revised Statutes.

UNITED STATES OF AMERICA,
District of Oregon, ss:

The grand jurors of the United States of America for the district of Oregon, duly impaneled, sworn, and charged to inquire within and for said district, upon their oaths and affirmations do find, charge, allege, and present:

Count one.

That Boze Yuginni and Cousin Boze Yuginni, the defendants above named, on, to wit, the 23rd day of April, 1920, three miles east of Boring, in the State and district of Oregon, and within the jurisdiction of this court, did feloniously, knowingly, and unlawfully engage in carrying on the business of distillers—that is to say, distillers of distilled spirits, to wit, spirituous liquors, within the intent and meaning of the internal-revenue laws of the United States—and while so engaged as aforesaid did then and there distill a large quantity of spirits, the exact quantity and amount thereof being to the grand jurors unknown, then and there subject to the internal-revenue tax then imposed by law upon distilled spirits; and that the said Boze Yuginni and Cousin Boze Yuginni, the defendants aforesaid, did then and there feloniously, unlawfully, and knowingly defraud and attempt to defraud the said United States of the said tax on the said spirits so by them distilled as aforesaid, contrary to the form of the statute in such case made and provided and
9 against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present:

Count two.

That Boze Yuginni and Cousin Boze Yuginni, the defendants aforesaid, on, to wit, the 23rd day of April, 1920, three miles east of Boring, in the State and district of Oregon, and within the jurisdiction of this court and within the internal revenue collection district of Oregon, did unlawfully, knowingly, wilfully, and feloniously fail to place and keep conspicuously, or at all, on the place of business conducted by them, the said defendants; that is to say, a business, to wit, a distillery for the production of spirituous liquor, any sign exhibiting in plain and legible letters, or at all, the name or firm of the distiller with the words "Registered Distillery" as required by law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present:

Count three.

That Boze Yuginni and Cousin Boze Yuginni, the defendants aforesaid, on, to wit, 23rd day of April, 1920, three miles east of Boring, in the State and district of Oregon, and within the jurisdiction of this court and within the internal revenue collection district of Oregon, did wilfully, knowingly, unlawfully, and feloniously carry on the business of distillers within the intent and meaning of the internal revenue laws of the United States without having given bond as required by law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present:

Count four.

That Boze Yuginni and Cousin Boze Yuginni, the defendants aforesaid, on, to wit, the 23rd day of April, 1920, three miles east of Boring, in the State and district of Oregon, and within the jurisdiction of this court, did willfully, knowingly, unlawfully, and feloniously make and ferment a certain mash, fit for distillation, a more particular description of the quantity and quality of the mash being to the grand jurors unknown, in a certain building not then and there a distillery duly authorized according to law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 18th day of June, 1920.

A true bill.

P. A. YOUNG,
Foreman, United States Grand Jury.
AUSTIN F. FLEGEL, JR.,
Assistant United States Attorney.

(Indorsed:) A true bill, P. A. Young, foreman grand jury. Filed in open court June 18, 1920, G. H. Marsh, clerk. Austin F. Flegel, jr., assistant United States attorney.

11 And afterwards, to wit, on Thursday, the 1st day of july, 1920, the same being the 106th judicial day of the regular March, 1920, term of said court; present the honorable Robert S. Bean, United States District judge, presiding, the following proceedings were had in said cause, to wit:

12 In the District Court of the United States for the District of Oregon.

The United States of America vs. Boze Yuginni and Cousin Boze Yuginni. No. C–8905. July 1, 1920.

Indictment: Sections 3257, 3279, 3281, and 3282 R. S. U. S.

Now at this day come the plaintiff by Mr. A. F. Flegel, jr., assistant United States attorney, and the defendants above named each in his own proper person and by Mr. Barnett H. Goldstein, of counsel. Whereupon said defendants being duly arraigned upon the indictment herein each for himself states to the court that his true name is Boze Yuginovich. And thereupon said defendants file a motion herein to quash the indictment, and demurrer to the defendant, and plea of former jeopardy. Whereupon upon motion of said plaintiff It is ordered that this cause be and the same is hereby set for hearing upon said motion and demurrer for Tuesday, July 6, 1920.

13 And afterwards, to wit, on the 1st day of July, 1920, there was duly filed in said court, a motion to quash indictment, in words and figures as follows, to-wit:

14 In the District Court of the United States for the District of Oregon.

United States of America, plaintiff, vs. Boze Yuginni and Cousin Boze Yuginni, defendants.

Motion to quash indictment.

Comes now the defendants herein, and each of them, by their attorney, Barnett H. Goldstein, and move that all of the counts in this indictment be quashed, on the ground and for the reason:

I.

That the laws of Congress, under which the said indictment was found and returned, have been and were, prior to the finding of this indictment, repealed, and that the said acts of Congress, hereinafter mentioned, were, prior to the finding of the said indictment,

inoperative and of no force and effect whatsoever, and in this behalf the said defendants allege:

(a) That the acts charged in the indictment are alleged to have been committed subsequent to the 17th day of January, 1920, on which date the Eighteenth Amendment to the Constitution of the United States and the statute of October 28, 1919 (National Prohibition Act), enforcing that amendment, took effect.

(b) That the said statutes last indicated are inconsistent with sections 3257, 3279, 3281, and 3282 of the Revised Statutes of the United States and therefore supersede and repeal the same.

Wherefore, the defendants move that the indictment herein be quashed.

BARNETT H. GOLDSTEIN,
Attorney for defendants.

15 UNITED STATES OF AMERICA, *District of Oregon, County of Multnomah, ss:*

I, Barnett H. Goldstein, do hereby certify that I have prepared the foregoing motion to quash, and that the same is filed in good faith and not for the purpose of delay, and in my opinion same is well founded in the law.

BARNETT H. GOLDSTEIN,
Attorney for Defendants.

STATE OF OREGON, *County of* ———, *ss:*

Due, timely, and legal service by copy admitted at ——— this 1 day of July, 1920.

AUSTIN F. FLEGEL, JR.,
Attorney for ———.

Filed July 1, 1920. G. H. Marsh, clerk.

16 And afterwards, to wit, on the 1st day of July, 1920, there was duly filed in said court a demurrer to indictment in words and figures as follows, to wit:

17 In the District Court of the United States for the District of Oregon.

United States of America, plaintiff, vs. Boze Yuginni and cousin, Boze Yuginni, defendants.

Demurrer to indictment.

Come now the defendants and demur to the indictment herein filed against them and each of them, as follows:

I.

Demur to counts one, two, three, and four of the said indictment, and to all of them, for the reason that sections 3257, 3279, 3281, and 3282 of the Revised Statutes of the United States, upon which they

are respectively based, are in conflict with and have been superseded and repealed by the eighteenth amendment to the Constitution of the United States and the statute of October 28, 1919 (national prohibition act), which became operative January 17, 1920, prior to the date of the alleged commission of the acts charged in this indictment.

II.

That none of said counts state facts sufficient to constitute a crime against the laws of the United States or to charge a crime against the said defendants or either of them.

BARNETT H. GOLDSTEIN,
Attorney for Defendants.

18 UNITED STATES OF AMERICA,
District of Oregon, County of Multnomah, ss:

I, Barnett H. Goldstein, do hereby certify that I have prepared the foregoing demurrer and that the same is filed in good faith and not for the purpose of delay and in my opinion same is well founded in the law.

BARNETT H. GOLDSTEIN,
Attorney for defendants.

STATE OF OREGON,
County of ———, *ss:*

Due, timely, and legal service by copy admitted at ——— this 1 day of July, 1920.

AUSTIN F. FLEGEL, Jr.,
Attorney for ———.

Filed July 1, 1920. G. H. Marsh, clerk.

19 And afterwards, to-wit, on Monday, the 12th day of July, 1920, the same being the 7th judicial day of regular July, 1920, term of said court; present the Honorable Robert S. Bean, United States district judge, presiding, the following proceedings were had in said cause, to-wit:

20 In the District Court of the United States for the District of Oregon.

The United States of America vs. Boze Yuginovich and Cousin Boze Yuginovich (indicted as Boze Yuginni and Cousin Boze Yuginni). No. C–8905. July 12, 1920.

Indictment: Sections 3257, 3279, 3281, and 3282, R. S. U. S.

This cause was heard by the court upon the motion of the defendants to quash the indictment herein, and the demurrer of said defendants to the indictment, and was argued by Mr. A. F. Flegel, jr., assistant United States attorney, and Mr. Barnett H. Goldstein, of counsel for said defendants. Upon consideration whereof

It is ordered that said motion be and the same is hereby allowed, and that said demurrer be and the same is hereby sustained; and

It is further ordered that said defendants go hence without day, and that the sureties upon their recognizance be and they are hereby exonerated from further liability in this behalf.

21 And afterwards, to wit, on the 12th day of July, 1920, there was duly filed in said court an opinion of the court, in words and figures as follows, to wit:

22 In the District Court of the United States for the District of Oregon.

United States, complainant, vs. Boze Yuginni and Cousin Boze Yuginni, defendants.

Portland, Oregon, July 13, 1920.

R. S. BEAN, D. J. (oral).

In the case of United States vs. Yuginni there are two defendants indicted for a violation of the internal revenue act. They are charged with engaging in the business of a distiller without having paid the tax required by the statute, and without having exhibited the sign of a registered distillery and without giving a bond, as required by the revenue act.

Demurrer has been filed and motion to quash the indictment on the ground that it appears from the face of the indictment that the alleged crime was committed after the national prohibition act went into effect. It is argued that this act was intended by Congress to cover the entire subject of the manufacture and sale of intoxicating liquors, and that it is inconsistent with the revenue act which provides for the levying of a tax upon distilleries and upon the liquor manufactured at such places.

The prohibition act is very comprehensive. It provides that no person shall on or after the date when the eighteenth amendment goes into effect manufacture, sell, barter, import, export, deliver, furnish, or possess any liquor except as authorized in this act, and then provides for the issuance of permits to manufacture liquor of certain grades and quality, provides the method of its manufacture, the labelling of the packages, the disposition of the liquor. It is intended, as I take it, to cover the entire subject, and in my judgment supersedes and operates as a repeal of the previous act governing the operation of distilleries.

23 It is true section 35 of the prohibition act provides that it shall not relieve anyone from paying any tax or other charges imposed upon the manufacture or traffic in liquor, and also provides that there shall be exacted and collected of any person responsible for the illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500.00 on retailers and $1,000.00 on manufacturers.

It would seem therefore that Congress intended that one who manufactured liquor in violation of the prohibition act should nevertheless be liable for the tax thereon. In that event, however, it

seems to me such a manufacturer must be proceeded against under the prohibition act and not the revenue statute.

This conclusion is in harmony with that arrived at in United States vs. Windham (264 Fed. 326). The reasoning of the opinion in that case appeals to me as sound.

The motion to quash will be allowed.

Filed July 23, 1920, as for July 12, 1920. G. H. Marsh, clerk.

24 And afterwards, to wit, on the 26th day of July, 1920, there was duly filed in said court, a petition for writ of error, in words and figures as follows, to wit:

25 In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR *vs.* BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, indicted as Boze Yuginni and Cousin Boze Yuginni, defendants.	At law. No. C—8905.

Petition for writ of error.

Comes now the United States of America, plaintiff herein, by Austin F. Flegel, jr., assistant United States attorney for Oregon, and says that on the 12th day of July, 1920, the District Court above entitled entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

AUSTIN F. FLEGEL, Jr.,
Attorney for Plaintiff in Error.

26 UNITED STATES OF AMERICA,
District of Oregon, ss:

Due, legal, and timely service of the foregoing petition for writ of error, by receipt by me of copy thereof, duly certified to by Austin F. Flegel, jr., assistant United States attorney for the District of Oregon, is hereby admitted at Portland, Oregon, this 26th day of July, 1920.

BARNETT H. GOLDSTEIN,
Attorney for Defendant in Error.

Filed July 26, 1920. G. H. Marsh, clerk.

27 And afterwards, to wit, on the 26th day of July, 1920, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit:

28 In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, indicted as Boze Yuginni and Cousin Boze Yuginni, defendants in error.	At law. No. C-8905.

Assignment of errors.

The plaintiff in this action in connection with its petition for writ of error makes the following assignment of errors, which plaintiff avers exist:

I.

The court erred in sustaining the demurrer of the defendants to the indictment in the above entitled cause.

II.

The court erred in allowing defendants' motion to quash indictment in the above entitled cause.

III.

The court erred in dismissing the indictment in the above entitled cause.

IV.

The court erred in holding that the national prohibition act supersedes and operates as a repeal of sections 3257, 3279, 3281, and 3282 of the Revised Statutes of the United States.

V.

The court erred in not holding that the intent, purpose, and effect of section 35, title 2, of the national prohibition act is to continue in full force and effect sections 3257, 3279, 3281, and 3282 of the Revised Statutes of the United States and to prevent a repeal of the same.

29 VI.

The court erred in holding that the national prohibition act is inconsistent with section 3257 of the Revised Statutes of the United States and, therefore, operates as a repeal of said section 3257 aforesaid.

VII.

The court erred in holding that the national prohibition act is inconsistent with section 3279 of the Revised Statutes of the United States and, therefore, operates as a repeal of said section 3279 aforesaid.

VIII.

The court erred in holding that the national prohibition act is inconsistent with section 3281 of the Revised Statutes of the United States and, therefore, operates as a repeal of said section 3281 aforesaid.

IX.

The court erred in holding that the national prohibition act is inconsistent with section 3282 of the Revised Statutes of the United States and, therefore, operates as a repeal of said section 3282 aforesaid.

X.

The court erred in holding and adjudging that the indictment in the above entitled cause did not state facts sufficient to constitute an offense against the peace and dignity of the United States and did not constitute a valid indictment against the defendants herein and each of them.

AUSTIN F. FLEGEL, JR.,
Attorney for Plaintiff in Error.

30 UNITED STATES OF AMERICA, *District of Oregon, ss:*

Due, legal, and timely service of the foregoing assignment of errors, by receipt of copy thereof, duly certified to by Austin F. Flegel, jr., assistant United States attorney for the district of Oregon, is hereby admitted at Portland, Oregon, this 26th day of July, 1920.

BARNETT H. GOLDSTEIN,
Attorney for Defendant in Error.

Filed July 26, 1920. G. H. Marsh, clerk.

31 And afterwards, to wit, on Monday, the 26th day of July, 1920, the same being the 19th judicial day of the regular July term of said court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

32 In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, indicted as Boze Yuginni and Cousin Boze Yuginni, defendants in error.	No. C–8905.

Order allowing writ of error.

On this 26th day of July, 1920, the United States of America, the above-named plaintiff in error, by Austin F. Flegel, jr., assistant United States attorney for the district of Oregon, presented to the court its petition praying for the allowance of writ of error in the above-entitled cause and presenting assignment of error intended to be urged by plaintiff and praying also that transcript of record, proceedings, and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other proceedings may be had as are proper in the premises.

Now, therefore, in consideration thereof the court does allow the writ of error as prayed for in petition of plaintiff.

R. S. BEAN,
United States District Judge.

33 UNITED STATES OF AMERICA,
District of Oregon, ss:

Due, legal, and timely service of the foregoing order allowing writ of error, by receipt by me of copy thereof, duly certified to by Austin F. Flegel, jr., assistant United States attorney for the district of Oregon, is hereby admitted at Portland, Oregon, this 26th day of July, 1920.

BARNETT H. GOLDSTEIN,
Attorney for Defendant in Error.

Filed July 26, 1920. G. H. Marsh, clerk.

34 And afterwards, to wit, on the 26th day of July, 1920, there was duly filed in said court a writ of error from the Supreme Court of the United States in words and figures as follows, to wit:

35 In the Supreme Court of the United States of America.

United States of America, plaintiff in error, vs. Boze Yuginovich and Cousin Boze Yuginovich, indicted as Boze Yuginni and Cousin Boze Yuginni, defendants in error.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the District of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the

Honorable R. S. Bean, one of you, between United States of America, plaintiff and plaintiff in error, and Boze Yuginovich and Cousin Boze Yuginovich, defendants and defendants in error, a manifest error has happened, to the great damage of the said plaintiff in error, as by petition doth appear; and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, and in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

36 Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 26th day of July, 1920.

[Seal of the U. S. District Court, District of Oregon.]

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

Allowed by R. S. Bean, United States District Judge.

Filed July 26, 1920. G. H. Marsh, clerk, United States District Court, District of Oregon.

37 And afterwards, to wit, on the 30th day of July, 1920, there was duly filed in said court a præcipe for transcript of record on writ of error, in words and figures as follows, to wit:

38 In the District Court of the United States for the District of Oregon.

United States of America vs. Boze Yuginovich and Cousin Boze Yuginovich, indicted as Boze Yuginni and Cousin Boze Yuginni, defendants.

Præcipe for certified transcript of record on appeal to the United States Supreme Court.

To the clerk of the above entitled court:

Please make and issue a certified transcript of the record on appeal to the Supreme Court of the United States in the above entitled cause consisting of the following:

1. Typewritten copy of indictment returned in the above entitled cause the 18th day of June, 1920.
2. Typewritten copy of record of arraignment of defendants Boze Yuginni and Cousin Boze Yuginni.
3. Typewritten copy of the demurrer filed by defendants to the indictment.
4. Typewritten copy of defendants' motion to quash the indictment.
5. Typewritten copy of the opinion of Hon. R. S. Bean in said cause filed the 13th day of July, 1920.
6. Typewritten copy of order and judgment of the above entitled court rendered July 13th, 1920, sustaining the defendants' demurrer and allowing defendants' motion to quash.
7. Typewritten copy of petition of plaintiff for writ of error.
8. Typewritten copy of plaintiff's assignment of errors.
9. Typewritten copy of order of the above entitled court allowing writ of error.
10. Typewritten copy of writ of error.
11. Typewritten copy of præcipe for certified transcript of record on appeal to the United States Supreme Court.

39 12. Original certificate of clerk of the District Court of the United States for the District of Oregon to transcript of record.

13. Original citation on appeal to the United States Supreme Court.

AUSTIN F. FLEGEL, Jr.,
Assistant United States Attorney.

UNITED STATES OF AMERICA,
District of Oregon.

Due, legal, and timely service of the within praecipe for certified transcript of record on appeal to the United States Supreme Court by the receipt by me of copy thereof is hereby acknowledged this 30 day of July, 1920, at Portland, Oregon.

BARNETT H. GOLDSTEIN,
Attorney for Defendants.

Filed July 30, 1920. G. H. Marsh, clerk.

40 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 7 to 39, inclusive, constitute the transcript of record upon writ of error issued out of the Supreme Court of the United States to the United States District Court for the District of Oregon in the case in which the United States of America is plaintiff and plaintiff in error and Boze Yuginnovich, indicted as Boze Yuginni,

and Boze Yuginnovich, indicted as Cousin Boze Yuginni, are defendants and defendants in error. That said transcript has been prepared in accordance with the praecipe for transcript filed by the assistant United States attorney for the District of Oregon, and is a true and complete transcript of the record and proceedings had in said court in said cause as designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that I return, with the said transcript of record attached, the original writ of error issued in said cause and the original citation.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this 25th day of August, 1920.

[SEAL.]

G. H. MARSH,
Clerk, United States District Court
for the District of Oregon.

(Indorsement on cover.) File No. 27,880, Oregon D. C. U. S. Term No. 523. The United States of America, plaintiff in error, vs. Boze Yuginovich and Cousin Boze Yuginovich. Filed September 2d, 1920. File No. 27,880.

10388—20——2

○

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, plaintiff in error,
v.
BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH.
No. 523.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and set it for hearing on February 28, 1921.

The defendants in error were indicted for a violation of certain provisions of the internal-revenue laws with respect to the manufacture of whisky. A demurrer to the indictment was sustained upon the ground that these provisions of the law were superseded by the national prohibition act (41 Stat., c. 83, p. 305). The question

is one as to which considerable confusion exists, and it is important to the administration of the law that there should be a speedy decision of it.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

JANUARY, 1921.

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No. 528.

In the Supreme Court of the United States.

October Term, 1920.

THE UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,
v.
BOSE YOSHIKAWA AND CORNIA BOSE YOSHIKAWA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR THE UNITED STATES.

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AUTHORITIES CITED.

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STATEMENT OF THE CASE.

The defendants were indicted for violation of Revised Statutes, sections 3257, 3279, 3281, and 3282. The indictment is in four counts. The first count, based upon Revised Statutes, section 3257, charges that the defendants, on April 23, 1920, within the jurisdiction of the court, "did feloniously, knowingly, and unlawfully engage in carrying on the business of distillers * * * and while so engaged as aforesaid did then and there distill a large quantity of spirits * * * then and there subject to the internal revenue tax then imposed by law upon distilled spirits; and that * * * the

defendants aforesaid did then and there feloniously, unlawfully, and knowingly defraud and attempt to defraud the said United States of the said tax on the said spirits so by them distilled as aforesaid." (R. 3.)

The second count, based on Revised Statutes, section 3279, charges that the defendants at the same time and place "did unlawfully, knowingly, wilfully, and feloniously fail to place and keep conspicuously, or at all, on the place of business conducted by them, the said defendants; that is to say, a business, to wit, a distillery for the production of spirituous liquor, any sign exhibiting in plain and legible letters, or at all, the name or firm of the distiller with the words 'Registered Distillery' as required by law." (R. 4.)

The third count, based upon Revised Statutes, section 3281, charges that the defendants at the same time and place "did wilfully, knowingly, unlawfully, and feloniously carry on the business of distillers within the intent and meaning of the internal revenue laws of the United States without having given bond as required by law." (R. 4.)

The fourth count, based on Revised Statutes, section 3282, charges that the defendants at the same time and place "did wilfully, knowingly, unlawfully, and feloniously make and ferment a certain mash, fit for distillation, a more particular description of the quantity and quality of the mash being to the grand jurors unknown, in a certain building not then and there a distillery duly authorized according to law."

The court sustained defendants' motion to quash and demurrer (R. pp. 7–9) on the ground that it appeared on the face of the indictment that the alleged crimes were committed after the National Prohibition Act had gone into effect, and that therefore the statutes on which the indictments were based had been repealed.[1] (266 Fed. 746.)

Whether the court erred in so doing is the only question which is open to consideration on this writ of error.

ARGUMENT.

I. The Statutes on Which the Indictment is Based were not Repealed by the National Prohibition Act.

(A) The Provisions of the Revenue Laws Stated.

By title 35, chapter 4, of the Revised Statutes, and subsequent acts, a tax is imposed on all distilled spirits produced within the United States of $1.10 on each proof gallon or wine gallon, when below proof, which attaches to the spirits as soon as they are produced; and for the purpose of enforcing the collection of the tax the business of producing distilled spirits is placed under strict Government supervision. It is provided that every person engaged in or intending to engage in the business of distilling spirits must give notice of such intention to the internal revenue collector of the district wherein such business is to be carried on (R. S., sec. 3259), and must, before proceeding with such business and

[1] The relevant sections of the Revised Statutes and of the National Prohibition Act are reprinted in an appendix attached hereto.

on May 1 of each succeeding year, execute a bond in the form prescribed by the Commissioner of Internal Revenue conditioned that he shall comply with the provisions of law relating to the duties and business of distillers. (R. S., sec. 3260.)

No vessel to be used for the purpose of distilling shall be set up without the permit in writing of the collector (R. S. sec. 3265), and every still must be registered with the collector immediately upon being set up (R. S., sec. 3258); the distiller must keep conspicuously on his distillery a sign showing the name or firm of the distiller with the words "Registered Distillery" (R. S., sec. 3279); and the making or fermenting of a mash, wort or wash fit for distillation or for the production of spirits or alcohol in any building or on any premises other than a distillery duly authorized according to law is prohibited (R. S., sec. 3282).

The distiller must cause to be made an accurate plan and description of the distillery and distilling apparatus and file it with the collector and Commissioner of Internal Revenue (R. S., sec. 3263); thereupon the collector makes a survey of the distillery and estimates its producing capacity (R. S., sec. 3264).

All spirits must be conveyed into receiving cisterns, from which they must be drawn into casks, which are thereupon gauged, proved, and marked by an internal revenue gauger, and immediately removed under the care of a Government storekeeper into the distillery warehouse, which the distiller is required to keep upon his premises, where

they are numbered by serial numbers and have attached stamps with the number of proof gallons of spirits contained therein written thereon. (R. S., secs. 3267, 3271, and 3287, as amended.) The amount of the tax then becomes fixed and determined, and the distiller is required to give bond to pay the tax and remove the casks within eight years. (R. S., sec. 3293, as amended, and sec. 49 of the act of Aug. 27, 1894.) The removal of the spirits from the distillery to any other place than the warehouse without paying the tax thereon is prohibited. (Sec. 3296.)

The distiller must make daily entries, in books kept for that purpose, of the grain and other materials used in the manufacture of spirits, and must render a sworn statement each month of the number of gallons produced by him and placed in his warehouse (R. S., secs. 3303 and 3307). The collector must determine whether the distiller has accounted in his returns for the preceding month for all the spirits produced by him. If the collector decides that he has not done so he may assess him upon the deficiency. In no case shall the distiller be assessed for a less amount of spirits than 80 per cent of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent he shall also be assessed upon the excess (sec. 3309). The obvious purpose of this and many other provisions of a similar nature was to prevent the secret production of spirits and consequent evasion of the tax. For failure to comply with

these requirements and for defrauding or attempting to defraud the United States of the tax on the spirits distilled by him the distiller is liable to severe punishment by fine and imprisonment.

B. The Sections under Consideration are not Inconsistent with the National Prohibition Act.

Title II, section 35, of the National Prohibition Act provides that "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws."

Now, the revenue laws can be said to be inconsistent with the National Prohibition Act only in so far as they interfere with its enforcement. In so far as their enforcement is an aid to the enforcement of the National Prohibition Act it can not be said in the face of the express provision of title II, section 35, that the latter act repeals them.

We have seen that the purpose of the revenue laws was to determine the amount of the tax which should be paid on distilled spirits, the manner in which it should be assessed, how and when it should be paid, and to prevent its evasion and enforce its collection. The purpose of the National Prohibition Act was to prohibit the production of all intoxicating liquors, including distilled spirits, without a permit from the Commissioner of Internal Revenue.

It provides in title II, section 35, that "this act shall not relieve *anyone* from paying any tax or other charges imposed upon the manufacture or traffic in such liquor." Unquestionably this provision refers to the internal revenue taxes imposed upon intoxicating liquors at the time the National Prohibition Act went into effect. Clearly spirits distilled under permit are subject to such tax.

Literally the provision that the act shall not relieve *anyone* from paying the tax imposed on the manufacture of intoxicating liquor applies whether the liquor is manufactured with or without a permit. But it has been argued that this provision should not be construed as subjecting spirits produced without a permit to a tax because there is such inconsistency between taxing an article and prohibiting its production that Congress could not have intended to do both; in other words, that the provision prohibiting the production of distilled spirits without a permit in inconsistent with the intention to tax such spirits when produced without a permit, and therefore the National Prohibition Act repealed the revenue laws, at least as applied to spirits distilled without a permit.

It has frequently been ruled that there is no inconsistency between taxing an article and prohibiting its production entirely. In the *License Tax Cases*, 5 Wall. 462, it was held that a person could be convicted for retailing liquors without a Federal license and selling lottery tickets without having paid the

special tax imposed by Federal law, although such acts were entirely prohibited under the laws of the States in which they were committed. This court said that there was nothing hostile or contradictory between the Federal and State legislation. The granting of a license was merely a form of imposing a tax. What the States prohibited the Federal Government discouraged by taxation. Both lines of legislation tended to the same result.

In *Foster* v. *Speed*, 120 Tenn. 470, it was held that the statute making the sale of intoxicating liquors a privilege and imposing a tax upon those engaged in that business was not repealed pro tanto by the law entirely prohibiting the sale of liquors within four miles of a schoolhouse. It was held that the two statutes were consistent and tended to effect the same purpose—viz, the prevention of the sale of liquor within four miles of a schoolhouse—and that anyone selling liquor within such territory must pay the tax imposed by the former law.

To the same effect see *Cooley on Taxation*, third edition, page 14; *Youngblood* v. *Sexton*, 32 Mich. 406.

In *Conwell* v. *Scars*, 65 Ohio st. 49, it was held that R. S., sections 4364–69, which provided, without exception or limitation, for the assessment of a tax upon the business of trafficking in intoxicating liquors, applied to such traffic, though carried on in violation of a municipal ordinance.

A similar question arose in the case of *State* v. *Moeling*, 129 La. Ann. 204. In that case the de-

fendant was indicted under a statute which provided that "whoever shall keep a grog or tippling shop, or retail spirituous liquor, without previously obtaining a license from the police jury, town, or city authorities, on conviction shall be fined," etc.

The defendant moved to quash the indictment on the ground that the prohibition and local option laws were in effect in the parish where the offence was alleged to have been committed, and that the police jury had not imposed and had no authority to impose any tax or license for the keeping of a grog or tippling shop or the retailing of spirituous and intoxicating liquors.

The motion was overruled, and the Supreme Court in affirming the judgment said:

> If it be a violation of the law to keep a grog or tippling shop, or to sell intoxicating liquor without a license in a place where a license might be obtained, *a fortiori* is it a violation of the law to keep such a shop or sell such liquor in a place where the law prohibits both the doing of those things without a license and the issuance of any license therefor. (Citing *State* v. *Kuhn*, 24 La. Ann. 474; *State* v. *Brown*, 41 La. Ann. 771, 6 So. 638; *State* v. *Gray*, 111 La. 853, 35 So. 952.)

In *Carpenter* v. *State*, 120 Tenn. 586, the court said:

> The contention of the plaintiff in error is that since the four-mile law, prohibiting the sale of intoxicating liquors within four miles of a schoolhouse where a school is kept, and making such sale a misdemeanor, applied to the town of

> Somerville, the statute requiring those dealing in intoxicants to pay a privilege tax, and making the sale without license to exercise such a privilege a misdemeanor, as provided in chapter 161, page 309, of the acts of 1899, do not apply to that territory; in other words, that *one can not be required to take out a license to do a thing, or punished for failure to take out such license, when the business proposed to be done is prohibited by law.*
>
> *This contention can not be sustained.* The business of retailing liquors in any part of the State, whether it be where they can be lawfully sold or where the sale is prohibited by the four-mile law, is made a privilege and taxed, and anyone engage in this business, although in violation of the latter law, is liable for this tax.

To the same effect are *Webster* v. *Commonwealth*, 89 Va. 154; *State* v. *Smiley*, 101 N. Ca. 709; *State* v. *Smith*, 126 N. Ca. 1057.

In Massachusetts it has been held that although the eighteenth amendment and the National Prohibition Act repealed the State laws in regard to intoxicating liquors in so far as they authorized the granting of licenses for the sale of such liquors, it did not repeal them in so far as they prohibited the selling of intoxicating liquors without a license. (*Commonwealth* v. *Nickerson*, 128 N. E. 273.)

Applying the principle of these cases to the case at bar, it is clear that the provision of title II, section 35, of the National Prohibition Act that the act shall not relieve anyone from paying the internal revenue tax imposed upon distilled spirits, should be construed to

mean that the tax must be paid upon such spirits even though they are distilled without a permit. That is its literal meaning and the one best calculated to effect the purposes of the act. In view of the provision of title II, section 3, that "all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," that is the construction which must be adopted.

The court below, while admitting that spirits distilled without a permit were subject to an internal-revenue tax, was of the opinion that, for failure to pay the tax, the distiller must be proceeded against under the National Prohibition Act, not the Revised Statutes. This contention is obviously unsound. The provision of title II, section 35, that "no liquor revenue stamps nor tax receipts for any illegal manufacture or sale shall be issued in advance," does not prohibit the collector of internal revenue from receiving the tax when tendered to him in accordance with the provisions of the revenue laws, but merely prohibits him from affixing stamps to the containers when the spirits have been distilled illegally.

The purpose of the provision that "upon evidence of such illegal manufacture or sale the tax shall be assessed against and collected from the person responsible for such illegal manufacture or sale, in double the amount now provided by law," is merely to confer upon the Commissioner of Internal Revenue that power to assess taxes where they have not been paid in the manner provided by law, which was con-

ferred upon him by Revised Statutes, section 3182 generally, and by Revised Statutes, section 3253, where distilled spirits are removed from the place where they were distilled without paying the tax upon them and without being deposited in a bonded warehouse. This power does not come into existence until after the distiller has failed to perform his duty with regard to paying the tax on distilled spirits as defined by other laws.

But the National Prohibition Act contains no provision as to the amount of the tax, nor how it shall be assessed, nor how or when it shall be paid, nor any measures to prevent its evasion. It is obvious, therefore, that for direction on all these matters the revenue laws must be looked to. Those laws provide that the tax must be paid on or before the removal of the spirits from the distillery unless they are deposited in the warehouse, when the tax must be paid before they are withdrawn from the warehouse and within eight years from the original entry for deposit. If the tax is not paid when it is due, the United States is defrauded and the distillers subjected to the penalties provided in Revised Statutes, section 3257. The cases cited above show that one may be punished for failure to pay a tax imposed upon an article the production of which is prohibited. This statute is, therefore, still in force, and the first count, which is based upon it, is good.

The other three counts are based upon provisions of the revenue laws which were designed to prevent the secret production of distilled spirits and conse-

quent evasion of the tax on them. Such, for instance, is the provision that no one shall be permitted to carry on the business of producing distilled spirits unless he executes annually a bond conditioned that he shall comply with the provisions of law relating to the duties and business of distillers. (R. S., sec. 3260.) For failure to comply with these provisions heavy penalties are imposed by Revised Statutes section 3281, upon which the third count of the present indictment is based. Such also are the provisions that every person having in his possession or custody a still shall register the same with the collector (R. S., sec. 3258), and every person engaged in distilling spirits shall keep conspicuously on his distillery a sign showing the name or firm of the distiller, with the words "registered distillery" (R. S., sec. 3279); and the provision that no mash, wort, or wash fit for distillation or for the production of spirits or alcohol shall be made or fermented in any building or in any premises other than a distillery duly authorized by law. (R. S., sec. 3282.) The second and fourth counts of the indictment are based on the last two of these statutes.

The prevention of the secret distillation of spirits is as necessary to the prevention of their distillation without a permit as it is to prevent the evasion of the Government tax on such spirits, and measures calculated to prevent such secret distillation do not interfere with but, on the contrary, are of material assistance in carrying out the purpose of the National Prohibition Act. It will not be contended that the sec-

tions here involved are actually inconsistent with any of its provisions. The failure of the National Prohibition Act to provide any means of preventing the evasion of the tax which under its terms is imposed upon distilled spirits shows that they were intended to be continued in force. Therefore the last three counts, which are based upon these statutes, are also good.

C. The National Prohibition Act Does Not Impliedly Repeal the Revenue Laws.

It may be argued, however, that although the revenue laws are not actually inconsistent with the National Prohibition Act, they are repealed by it because it covers the whole subject matter of the revenue laws and contains provisions plainly showing that it was intended as a substitute for those laws.

This contention is clearly unsound. The National Prohibition Act does not provide a substitute for the system of Government supervision of the production of distilled spirits established under the revenue laws. The only change which it makes in that respect is that since the act came into effect no distilled spirits can be produced at all except when authorized by a permit issued by the Commissioner of Internal Revenue, and then only in accordance with regulations prescribed by him and by other provisions of the act, none of which are in conflict with the provisions of the revenue laws. This is a necessary deduction from the fact that

under the National Prohibition Act all distilled spirits, whether produced with or without a permit, are subject to an internal revenue tax.

It has already been pointed out that that act contains no provision as to the amount of the tax, nor how it shall be assessed, nor how or when it shall be paid, nor measures to prevent the evasion of the tax. Provisions as to all these matters are just as necessary since as before the National Prohibition Act, and for directions as to them the revenue laws must be looked to. That is the subject of those laws, and a subject which is not covered by the National Prohibition Act at all.

Under these circumstances it is clear that, in the absence of any provision on the subject, the revenue laws would remain in force, except in so far as they are inconsistent with the National Prohibition Act. To remove all doubt on the subject that act provides that "all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws." Since the act expresses the extent to which it was intended to repeal prior laws, the rule that, where a later act covers the same subject matter as a prior one, it operates as an implied repeal of such prior act, would have no application, even if the National Prohibition Act did cover the same subject matter as the revenue laws. *United States* v. *Claflin*, 97

U. S., 546; *Henderson's Tobacco,* 11 Wall., 652; *Great Northern Ry. Co.* v. *United States,* 155 Fed., 945, 953, affirmed in 208 U. S., 452.

D. The Offenses Denounced by the Revenue Laws Are Not the Same as Those Denounced by the National Prohibition Act.

It may be argued, however, that although the provisions of the revenue laws are not actually inconsistent with those of the National Prohibition Act, an intention to repeal the former must be presumed because the penalties embraced by the later statute are lighter than those imposed by the earlier one for the same offenses. But this presumption applies only where the offenses denounced by both statutes are the same. It does not apply if each offense embraces an element not embraced in the other, as is the case here.

A person who distills spirits without filing a bond with the collector of internal revenue or keeping on his distillery a sign having thereon the name of the distiller with the words "registered distillery," or who makes a mash on premises not authorized as a distillery according to law, or who fails to pay, when due, the tax on distilled spirits produced by him, commits an offense against the revenue laws even though he has a permit from the Commissioner of Internal Revenue for distilling spirits, but he does not violate the National Prohibition Act; and if he distills spirits without a permit from the Commissioner of Internal Revenue he violates

the National Prohibition Act, though he may not offend against the revenue laws.

Therefore the argument that the National Prohibition Act repeals the revenue laws because it imposes lighter penalties than the earlier acts for the same offenses must be rejected as unsound; and for the same reason the argument must be rejected that to the extent that the National Prohibition Act denounces the same acts as those described in the revenue laws the latter must be held to have been repealed, as otherwise there would be an imposition of different penalties and punishments for the same offense contrary to the fifth amendment. It is true that under some circumstances the same act may constitute a violation of both statutes, but since the offenses denounced by the revenue laws are not the same as those denounced by the National Prohibition Act a person committing such an act may be prosecuted under both statutes. *Carter* v. *McClaughry*, 183 U. S. 365, 394; *Gavieres* v. *United States*, 220 U. S. 338; *Ebeling* v. *Morgan*, 237 U. S. 625.

The National Prohibition Act shows clearly the intention that a prosecution under it should not be a bar to prosecution for the same act if that act also constitutes an offense under the revenue laws, for it provides in title II, section 35: "Nor shall this act relieve any person from any liability, civil or criminal, heretofore or *hereafter* incurred under existing laws."

E. The Decisions of the Lower Courts Sustain the Government's Contentions.

The district courts have a number of times had occasion to consider the question whether and to what extent the National Prohibition Act repeals the revenue laws. In some cases their decisions have been adverse to the contentions of the Government. *United States* v. *Windham*, 264 Fed. 376; *United States* v. *Puhac*, 268 Fed. 392; *United States* v. *Stafoff*, 268 Fed. 417.

But in three well-considered cases the contentions here presented have been sustained. In *United States* v. *Sohm*, 265 Fed. 910, it was held that the National Prohibition Act did not repeal Revised Statutes, sections 3258, 3260, and 3282. In *United States* v. *One Essex Touring Automobile*, 266 Fed. 138, it was held that distilled liquors, whether produced under permit for lawful purposes or in violation of law, are still "a commodity in respect whereof a tax is imposed" within the meaning of Revised Statutes, section 3450, providing for the forfeiture of vehicles used for the removal, deposit, or concealment of such articles with intent to defraud the United States of the tax, and that that section was not inconsistent with the National Prohibition Act. In *United States* v. *Turner*, 266 Fed. 248, it was held that the National Prohibition Act did not repeal Revised Statutes, section 3296, which prohibits the removal of any distilled spirits on which the tax has not been paid to a place other than a

distillery warehouse provided by law and the removal of such spirits from a warehouse in any manner other than that provided by law.

CONCLUSION.

The internal revenue laws provide the regulations under which distilled spirits may lawfully be produced. The underlying purpose is not to restrict or even to discourage production but to insure the collection of the taxes on all that may be produced. These laws apply to all distilled spirits without regard to the purpose for which they are produced.

The National Prohibition Act does not absolutely prohibit the production of distilled spirits. It only prohibits their production *for beverage purposes* and adds another regulation—the obtaining of a permit—to govern their production for nonbeverage purposes.

The two laws are clearly supplementary and not inconsistent. The Government still imposes a tax on every gallon produced for any purpose and makes compliance with the provisions of the internal revenue laws necessary. Distilled spirits can not be lawfully produced except as the law has heretofore provided with the additional requirement of a permit. If the production is for nonbeverage purposes, the producer commits a new and distinct offense. Neither a compliance with the revenue laws nor obtaining a permit to manufacture for nonbeverage purposes will protect him from punishment for this offense.

It is respectfully submitted, therefore, that the judgment of the district court was erroneous and should be reversed and the cause remanded.

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Special Assistant to the Attorney General.
FEBRUARY, 1921.

APPENDIX.

Revised Statutes, section 3257: Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Revised Statutes, section 3279: Every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer, shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, or wholesale dealer, with the words "registered distillery," "rectifier of spirits," or "wholesale liquor dealer," as the case may be. Every person who violates the foregoing provision by negligence or refusal, or otherwise, shall pay a penalty of five hundred dollars. * * *

Revised Statutes, section 3281: Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits

distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. * * *

Revised Statutes, section 3282: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. * * *

The National Prohibition Act.

Title II.

Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act; and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only

as herein provided; and the commissioner may, upon application, issue permits therefor. * * *

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do.

All permits to manufacture, prescribe, sell, or transport liquor may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the commissioner may without formal application or new bond extend any permit granted under this act or laws now in force after August 31 in any year to December 31 of the succeeding year. * * * No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this title or any law of the United States or of any State regulating traffic in liquor. * * * Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued, and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of

any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof.

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the provisions of this act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the commissioner, be granted a permit to supervise such manufacture.

SEC. 10. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commis-

sioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided.

SEC. 11. All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale, and only to persons having permits to purchase in such quantities.

SEC. 12. All persons manufacturing liquor for sale under the provisions of this title shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating the name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon. * * *

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. * * *

SEC. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the pro-

visions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Sec. 28

SEC. 35. All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance; but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or

sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

Title III.

SEC. 2. Any person now producing alcohol shall, within thirty days after the passage of this act, make application to the commissioner for registration of his industrial alcohol plant, and as soon thereafter as practicable the premises shall be bonded and permit may issue for the operation of such plant; and any person hereafter establishing a plant for the production of alcohol shall likewise before operation make application, file bond, and receive permit.

SEC. 3. Warehouses for the storage and distribution of alcohol to be used exclusively for other than beverage purposes may be established upon filing of application and bond, and issuance of permit at such places, either in connection with the manufacturing plant or elsewhere, as the commissioner may determine; and the entry and storage of alcohol therein and the withdrawals of alcohol therefrom shall be made in such containers and by such means as the commissioner by regulation may prescribe.

SEC. 4. Alcohol produced at any registered industrial alcohol plant or stored in any bonded warehouse may be transferred under regulations to any other registered industrial alcohol plant or bonded warehouse for any lawful purpose.

SEC. 5. Any tax imposed by law upon alcohol shall attach to such alcohol as soon as it is in existence as such, and all proprietors of industrial alcohol plants and bonded warehouses shall be jointly and severally liable for any and all taxes on any and all

alcohol produced thereat or stored therein. Such taxes shall be a first lien on such alcohol and the premises and plant in which such alcohol is produced or stored, together with all improvements and appurtenances thereto belonging or in any wise appertaining.

SEC. 7. Any distillery or bonded warehouse heretofore legally established may, upon filing application and bond and the granting of permit, be operated as an industrial alcohol plant or bonded warehouse under the provisions of this title and regulations made thereunder.

SEC. 8. Alcohol may be produced at any industrial alcohol plant established under the provisions of this title, from any raw materials or by any processes suitable for the production of alcohol, and, under regulations, may be used at any industrial alcohol plant or bonded warehouse or sold or disposed of for any lawful purpose, as in this act provided.

SEC. 9. Industrial alcohol plants and bonded warehouses established under the provisions of this title shall be exempt from the provisions of sections 3154, 3244, 3258, 3259, 3260, 3263, 3264, 3266, 3267, 3268, 3269, 3271, 3273, 3274, 3275, 3279, 3280, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3302, 3303, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, and 3327 of the Revised Statutes; sections 48 to 60, inclusive, and sections 62 and 67 of the act of August 27, 1894 (Twenty-eighth Statutes, pages 563 to 568), and from such other provisions of existing laws relating to distilleries and bonded warehouses as may, by regulations, be declared inapplicable to industrial alcohol plants and bonded warehouses established under this act.

Regulations may be made embodying any provision of the sections above enumerated.

SEC. 12. The penalties provided in this title shall be in addition to any penalties provided in title 2 of this act, unless expressly otherwise therein provided.

SEC. 15. Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation.

SEC. 18. All administrative provisions of internal-revenue law, including those relating to assessment, collection, abatement, and refund of taxes and penalties, and the seizure and forfeiture of property, are made applicable to this title in so far as they are not inconsistent with the provisions thereof.

SEC. 19. All prior statutes relating to alcohol as defined in this title are hereby repealed in so far as they are inconsistent with the provisions of this title.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 523

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

BOZE YEGLMOVICH AND COUSIN, BOZE YUGINOVICH, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

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AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES.

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No.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

This is a writ of error to the District Court of the United States for the District of Oregon. The defendants in error, who were also the defendants below, were indicted on four counts for violations of the Internal Revenue Laws. The first count alleged a violation of section 3257 of the Revised Statutes in defrauding and attempting to defraud the United States of the tax on spirits distilled by these defendants. The second count alleged a violation of section 3279 of the Revised Statutes in failing to display the sign "Registered

Distillery" in a distillery run by these defendants. The third count alleged a violation of section 3281 of the Revised Statutes in carrying on the business of distillers without having given the bond required by law. And the fourth count alleged a violation of section 3282 of the Revised Statutes in making a mash in a place other than a duly authorized distillery.

The defendants demurred to the indictment and moved to quash it, which motion was, after hearing by the court, allowed and the demurrer was sustained. The court held that the sections of the Revised Statutes governing the liquor traffic were repealed by the Eighteenth Amendment and the National Prohibition Act and that hence the indictment charged no offense against the United States.

In none of these counts is it alleged that the acts were for the production of intoxicating liquors for beverage purposes, nevertheless the case was presented and decided upon the theory and assumption that the acts done were in violation of the Eighteenth Amendment and the provisions of the National Prohibition Act. This is shown by the failure of the indictment to allege that the distilling was of liquor for non-beverage purposes.

Hence all argument herein is addressed to the proposition that the internal revenue laws did not and do not apply to the acts alleged to have been committed by the defendants.

When reference is hereinafter made to the Revised Statutes, it will mean those sections thereof which contain the provisions of the internal revenue laws applicable to the manufacture of intoxicating liquor for lawful use—*i. e.*, medicinal and non-beverage use.

POINT I.

Sections 3257, 3279, 3281, and 3282 of the Revised Statutes are contrary to the United States Constitution as amended by the Eighteenth Amendment.

The sections of the Revised Statutes above named and under which the defendants have been indicted are a portion of the internal revenue laws of the United States and were enacted originally in the year 1868 (sec. 3257, act of March 31, 1868; sec. 3279, act of July 20, 1868; sec. 3281, act of July 20, 1868; sec. 3282, act of July 20, 1868).

There have been subsequent amendments, but no one of these sections has been amended for the past thirty to forty years and no change has been made in them since the Eighteenth Amendment to the Constitution went into effect. As passed and carried on the Statute Books their purpose was to aid in the collection of the revenue of the United States which was imposed by other sections of the same internal revenue laws enacted at the same time.

U. S. Revised Statutes, sec. 3141.

U. S. *v.* Hill, 123 U. S., 681, 686.

This court has held that the revenue laws are for the purpose of aiding the collection of the Government revenue and taxes.

U. S. *v.* Hill, 123 U. S., 681, 686.

U. S. *v.* Howell, 20 Fed., 718, 719.

Hutton *v.* Terrill, 255 Fed., 860, 862.

It is thus clearly to be seen that these sections are not penal statutes intended to punish a violation of a statute or the

Constitution, but are mere means to assure the payment of taxes imposed in other sections of the same acts upon lawful and constitutional enterprises.

In speaking of the revenue laws, the court said, in Edwards *v.* Wabash Ry. Co., 264 Fed., 610 (C. C. A., 2d Cir.), at page 617: "Statutes of this kind are not remedial laws, nor are they founded on any permanent public policy. They impose burdens on the public and restrict the pursuit of occupations and the enjoyment of property."

The constitutional policy of the United States on the liquor question is now shown by the Eighteenth Amendment, and these taxing statutes passed fifty years ago cannot be continued in opposition to that constitutional policy.

In the License Tax cases, 5 Wall., 462, this court held (p. 474) that the requirement of payment for licenses under the internal revenue laws was only a mode of imposing taxes on the licensed business, and that the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of the tax. This rule is reiterated in Knowlton *v.* Moore, 178 U. S., 41, 61. Under these decisions, therefore, this indictment charges these defendants with the offense of not paying a tax to procure a license to carry on the business of distillers of intoxicating liquors to be used for beverage purposes—a business expressly prohibited by the terms of the Constitution itself.

The power to lay and collect taxes is given to Congress by article I, section 8 of the Constitution.

This power is not unlimited, but must be exercised by Congress, like all the other powers, in accordance with the terms of that instrument. It provides that "manufacture, sale, or transportation of intoxicating liquors within, the importation

thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

U. S. Constitution, article 18, sec. 1.

It is axiomatic that the taxing power of Congress is limited by the provisions of the Constitution from which the Congress derives the power to tax at all.

It has been held that "Subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all the usual objects of taxation" (Knowlton *v.* Moore, 178 U. S., 41, 58), and it is to be noted that two limitations are imposed—*i. e.*, that the power is subject to the limitations of the Constitution and that it extends to only the usual objects of taxation. The converse of this proposition must also be true, namely, that the power of taxation cannot be extended to other than usual objects of taxation—certainly not to acts prohibited by the Constitution itself.

The acts for which a tax is sought to be imposed and collected from the defendants (in that they are indicted for violation of statutes in aid of the collection of the tax) are acts forbidden by the Constitution and made criminal acts by a statute passed to carry into effect the constitutional provision and which act provides exclusive punishments for violation thereof.

This court has never passed directly upon the proposition of laying a tax upon crime and in fact expressly refused to pass upon that question in a case in which the question was not directly before it. It did, however, state (License Tax cases, *supra,* at page 469): "It is not necessary to decide whether or not Congress may, in any case, draw revenue by

law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature." We submit that it is a fundamental principle of morality and justice, no less than an indispensable requirement of a sound public policy, that Congress cannot lay a tax and attempt to collect a revenue from an act that is forbidden by the Constitution of the United States.

The court is respectfully reminded that we are dealing with taxing statutes passed in accordance with the power of Congress to lay and collect taxes, and that there is not before it any statute in its nature penal or passed to secure the enforcement of the constitutional amendment.

There is a line of cases in the various State courts which state broadly that a tax may be levied upon a prohibited business, but a reading of these cases will show that in each instance the tax sought to be collected was imposed on a business which was lawful in some parts of the State but forbidden or prohibited by local ordinance or statute. These cases are all local-option cases. It is also respectfully called to the attention of the court that the statutes in some of these cases were plainly stated to be preventive and not revenue statutes. In no case was there an attempt to *tax for revenue an act prohibited by the Constitution of the State or of the United States.*

It is also in point at this time to call attention to the fact that the powers of Congress and of the State legislatures differ.

Congress and the Federal Government have such powers as

are delegated to them by the Federal Constitution and no more.

The State legislatures have all the powers not taken from them by the Federal and State constitutions; hence it might be that a State legislature could tax for revenue a crime if there were no prohibition in the Federal or State Constitution, but the Congress cannot do so unless given the power.

In only one jurisdiction has a similar question to that in the case at bar arisen. This is in the case of Peo. *v.* Raynes, 3 Cal., 366. The action was brought to recover the license fee for a gaming license. A State statute forbidding gambling had been passed, but apparently had not resulted in abolishing the evil. The State legislature then passed a statute, intended to derive a revenue from an evil that could not be abolished, providing for a license of and a tax upon gaming-houses. Both statutes were passed *by the same authority*—*i. e.*, the State legislature—and both were *State-wide* in their operation. The court, in dismissing the suit, held that an action would not lie for a tax upon a crime and that such a tax cannot be levied.

It is significant that in the California case just cited the taxing statute was passed subsequent to the criminal statute, and hence might have been held to indicate a change in public policy; while in the case at bar the taxing statute was passed long before the constitutional amendment prohibiting the act theretofore taxed and making that act criminal.

An article the manufacture of which is prohibited by the Federal Constitution stands in a different relation to the taxing power of Congress from an article the manufacture of which is prohibited by a statute passed pursuant to the legislative power vested in Congress.

Congress may tax anything that is one of the usual subjects of taxation, and it may provide that until the tax is paid it is unlawful to have any connection with the subject-matter taxed; but this is not because the subject-matter is tainted with crime or illegality in itself, but because Congress under its constitutional taxing and legislative powers has decided to make use of the subject-matter for the purpose of raising revenue and has made it unlawful to practice or pursue a business that is lawful in and of itself until a tax is paid for a license to practice or pursue it.

The tax once paid pursuant to law, the business or other subject-matter taxed becomes entirely lawful, so far as the Federal power of licensing it is concerned.

Before the Eighteenth Amendment became part of the Federal Constitution the liquor traffic was a lawful occupation so far as Federal authority was concerned, but it was unlawful to have any connection with that traffic until the taxes levied thereon were paid; but when the Eighteenth Amendment became part of the Federal Constitution the liquor traffic became illegal and Congress can no longer license and tax that traffic.

Since Congress no longer has the power to levy the tax, the statutes imposing that tax are *ipso facto* repealed and sections of the Revised Statutes here under discussion, having been enacted solely by virtue of the power of Congress to lay and collect taxes, were repealed by the passage of the Eighteenth Amendment since they are contrary to the provisions of the Federal Constitution.

The attempt to recreate the power to tax liquor destroyed by the Eighteenth Amendment by the saving clauses of the National Prohibition Act is abortive.

Under section 5 of title I of the National Prohibition Act "all the power for the enforcement of the War Time Prohibition Act * * * which is conferred by law for the enforcement of existing laws relating to the manufacture * * * of intoxicating liquors" are conferred on all officers of the United States.

The power of enforcement here conferred has reference only to the governmental agencies in existence at the time the revenue laws affecting liquor were repealed and destroyed by the Eighteenth Amendment, such as the police agents employed in the Internal Revenue Department, the Federal courts, and their processes and proceedings. But the law to be enforced by this machinery was the War Time Prohibition Act and not the statutes designed and enacted for the purpose of deriving revenue from an industry prohibited by the terms of the Constitution itself.

By section 28 of title II of the National Prohibition Act "all the power and protection in the enforcement of this act * * * which is conferred by law for the enforcement of existing laws relating to the manufacture * * * of intoxicating liquors" is conferred on all officers of the United States.

Again what is conferred here is the power to use existing governmental agencies formerly used to enforce laws now repealed. The intent of Congress is clear; it simply turns over to the proper officers to enforce the new law the machinery built up in enforcing the prior law or laws, and this fact in itself is an indication of the legislative intent to repeal existing laws designed to enforce payment of a tax.

Section 35 of title II of the National Prohibition Act furnishes no authority for holding that the revenue laws affect-

ing the manufacture of intoxicating liquors are not repealed by the constitutional provision.

All that section 35 does is to provide that its enactment "shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." Such liquor is liquor the manufacture and sale of which is provided for by the sentence next preceding, wherein reference is made to certain regulations provided in the act itself for the manufacture and traffic in intoxicating liquors. But these regulations refer solely to the manufacture of liquor for non-beverage purposes and wine for sacramental purposes. And, as has been pointed out, these defendants are charged with manufacturing liquor for *beverage* purposes—an act expressly forbidden by a constitutional provision.

Section 35 of the act provides that "all provisions of law that are inconsistent" with the National Prohibition Act are repealed, and this language must be held to expressly repeal the sections of the Revised Statutes here in question, because those sections provide for a license for and a tax on the manufacture of that kind of liquor the manufacture of which is forbidden by the terms of the act itself, and, hence, are provisions of law "inconsistent" with the National Prohibition Act.

That is to say, a tax may be imposed and is imposed by the National Prohibition Act on the manufacture of intoxicating liquor for non-beverage purposes, and the amount of the tax thus imposed on such lawful manufacture for medicinal purposes is the amount fixed by the appropriate sections of the internal revenue laws.

The provisions of the National Prohibition Act are the

ones violated by manufacturing liquor for other than non-beverage, medicinal, or sacramental purposes, not the provisions of the internal revenue laws. The internal revenue laws were passed for the express purpose of making the manufacture of intoxicating liquor for beverage purposes legal *after* the tax was paid.

It would be highly inconsistent to tax a person for a license to do something he is forbidden to do by law, and that would be the case here if these defendants were tried and convicted of the offense of not paying a tax to secure the right to do something they could not lawfully do in any event.

U. S. *v.* Wyndham, 264 Fed., 376.

U. S. *v.* Yuginni, 266 Fed., 746.

It is necessary in this connection to differentiate between a tax and a penalty. As has been pointed out, the violation of the sections of the Revised Statutes here in question were enacted to penalize a person who avoided payment of a tax. Since the Government can no longer impose the tax, certainly there can be no punishment meted out for not paying it.

And when Congress seeks to superimpose upon the punishment for violation of the National Prohibition Act the additional punishment it heretofore had imposed for violation of the Internal Revenue Act, it clearly has exceeded its powers and infringed the constitutional rights of citizens under article V and article CI of the Constitution.

There is nothing in the National Prohibition Act that indicates in the slightest degree that it was the legislative intent to continue the internal revenue tax on the manufacture of intoxicating liquor for beverage purposes. To the contrary,

the intention to destroy the traffic in liquor for beverage pu
poses is clearly expressed. How, then, can it be held tha
laws passed with the intent and design of legalizing and co
trolling that traffic are consistent with the act?

If the revenue statutes are not consistent, then they a
inconsistent and expressly repealed by the terms of sectio
35 of the act—at least as far as those laws act on liquor-mak
ing for beverage purposes, and that is the offense and the on
offense with which these defendants are charged under th
indictment.

POINT II.

**The sections of the Revised Statutes relating to intox
cating liquors were repealed by the National Prohibitio
Act.**

The sections of the Revised Statutes here under discussio
were first passed fifty years ago and were continued in effe
and from time to time added to and amended as required b
the interpretations given them and the changing circum
stances of the Nation. But during this period, extending
the adoption of the Eighteenth Amendment, the policy
the Federal Government toward the liquor traffic remaine
the same. It was a legal and proper business, but it was co
sidered a legitimate source of taxation (as any other leg
business may be), and it was taxed for the purpose of raisi
revenue to carry on the Government. The business w
not in itself illegal or prohibited, although to aid in the co
lection of the revenue it was illegal and prohibited to carry
on without paying the tax and securing a license as eviden
of the payment of the tax. But with the passage and ado

tion of the Eighteenth Amendment the public policy of the Nation changed and the liquor traffic became *in itself* an illegal and improper business. It was henceforth *mala prohibita*. It is now illegal to engage in it, with or without paying the tax and with or without securing a license, and in fact no license would be issued if a request were made for it. And in furtherance of this changed public policy and in enforcement of the constitutional provision the National Prohibition Act (act of October 28, 1919), commonly known as the Volstead Act, was passed.

This act purported to cover the entire field of intoxicating liquors, both for beverage and non-beverage purposes, and states in its title that it is "An act to prohibit intoxicating beverages and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

It was intended to provide a complete system, in and of itself, for the regulation of intoxicating liquors for beverage and non-beverage purposes. If it did not cover every conceivable situation it is no worse than many another statute that has had that same fault and that has from time to time been amended to meet the exigencies as they arise. The important point is that the Volstead Act was intended and did attempt to meet all situations and to lay down a complete program.

Under these circumstances the well-known rule of implied repeal of statutes must be applied. It is said in 22 Cyc., 1606: "When a later statute is a complete revision of the subject to which the earlier statute related and the new legis-

lation was manifestly intended as a substitute for the former legislation, the prior act must be held to have been repealed." To this same effect see also

U. S. *v.* Ranlett, 172 U. S., 133, 140-1.
Daviess *v.* Fairborn, 44 U. S., 636.
N. J. Steamboat Co. *v.* Pleasanton, 18 Wall., 478.
U. S. *v.* Henderson, 11 Wall., 652, 657.
U. S. *v.* Barr, 24 Fed. Cas., 1016, 1017; Fed. case No. 14527.
U. S. *v.* Cheesman, 25 Fed. Cas., 416; Fed. case 14790.

In the latter case the court said, at page 416: "But the latter embraces the entire subject-matter of the prior act on the subject, making changes on the point in question and adding other provisions, and was manifestly intended as a substitute for it. In such cases it is well settled that the operation of the later act is to repeal the one for which it is substituted. Murdock *v.* City of Memphis, 20 Wall. (87 U. S.), 617; U. S. *v.* Tynen, 11 Wall. (78 U. S.), 88; Henderson's Tobacco, *id.*, 652; Bartlett *v.* King, 12 Mass., 537; Com. *v.* Cooley, 10 Pick., 37; Pierpont *v.* Crouch, 10 Cal., 315; Sedg. St. & Const. Law, 126; Butler *v.* Russell (case No. 2243); Morris *v.* Crocker, 13 How. (54 U. S.), 438."

In the case of Rogers *v.* Nashville, C. & St. L. Ry. Co., 8 Fed., 299 (C. C. A., 6th Cir., opinion by Lurton, J., concurred in by Taft, J., and Severens, J.), the rule is excellently set forth at page 323: "Undoubtedly the general rule is that when there are two acts upon the same subject effect should be given to both, if possible. This is impossible, if the acts are repugnant in any of their provisions. The new law must, therefore, operate as a repeal of the old law, without

regard to a repealing clause, to the ext[illegible] the repugnancy. Neither is it always essential that th[illegible]ll be an express repugnancy between the new and old sta[illegible]es. If the latter law covers the whole field embraced by the earlier act, and includes any new legislation tending clearly to indicate that the new statute was intended to take the place of the first act, it will be treated as repealing by implication the older provisions on the same subject. It will not be presumed that the legislature intended two distinct enactments on the same subject; Suth. St. Const., secs. 154-156. In U. S. *v.* Tynen, 11 Wall., 88, 92, Mr. Justice Field said: 'Where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' To the same effect are Pierpont *v.* Crouch, 10 Cal., 315; Schneider *v.* Staples, 66 Wis., 167; 28 N. W., 145; Com. *v.* Cooley, 10 Pick., 37; Druggists' cases, 85 Tenn., 450; 3 S. W., 490; Poe *v.* State, 85 Tenn., 495; 3 S. W., 658."

In addition to the inconsistency and the repugnancy between the Volstead Act and the Revised Statutes, as set forth above, in the public policy which prompted the enactments, the nature of the two statutes must be considered. The Volstead Act is a penal, regulatory, and prohibitive statute. The Revised Statutes are tax and revenue statutes pure and simple. Therefore there is a basic repugnancy that cannot be overcome, and even the attempted saving clause in the Volstead Act is not sufficient to prevent the application of the well-settled rules of law.

The Volstead Act also comes within the rule that a statute covering the whole subject-matter of a former one, adding

offenses and varying the procedure, operates, not cumula tively, but by way of substitution, and impliedly repeals th former.

U. S. *v.* Claflin, 97 U. S., 546, 551.
Norris *v.* Crocker, 13 How., 429, 438.

In the former case, at page 551, this court adopted and ap proved the rulings in Mitchell *v.* Brown, 1 Ell. & Ell., 267 *Ex parte* Baker, 2 Hurls. & N., 219, and Parry *v.* Croydo Gas. Co., 15 C. B. (N. S.), 568. That the Volstead Ac adds offenses and varies the procedure there can be n dispute.

In this connection the rule of clemency has application A subsequent statute imposing milder penalties impliedly re peals any former act on the subject.

Smith *v.* State, 1 Stew. (Ala.), 506.
State *v.* Whitworth, 8 Port. (Ala.), 434.
Peo. *v.* Tisdale, 57 Cal., 104.
Hayes *v.* State, 55 Ind., 99.
U. S. *v.* Windham, 264 Fed., 376.

As stated in the latter case, in every instance the penaltie for violations set forth in the Volstead Act are not as sever as those contained in the Revised Statutes.

Section 3257 of the Revised Statutes carries a penalty forfeiture of distillery, all apparatus, and all raw material together with a fine of not less than $500 nor more tha $5,000 and imprisonment for not less than six months n more than three years. Section 3279 provides for a fine $500 for failure to post the sign "Registered Distillery Section 3281 provides for a fine of not less than $1,000 n

more than $5,000 and imprisonment for not less than six months nor more than two years. Section 3282 provides for forfeiture and a fine of not less than $500 nor more than $5,000 and imprisonment for not less than six months nor more than two years.

Section 29 of the Volstead Act (act of October 28, 1919) provides for a fine of not more than $1,000 or imprisonment for not more than six months in the case of a first offender manufacturing or selling liquor in violation of the act, and also sets a general penalty for all violations not specifically provided for of a fine of not more than $500 on first offense. No minimum is set for the fines, and a fine and imprisonment together, as provided in the Revised Statutes, are not imposed for any first offense. A distillery is declared to be a common nuisance and may be enjoined (secs. 21 and 22) and upon conviction of maintaining such nuisance a fine of not more than $1,000 or imprisonment for not more than one year or both may be imposed. But imprisonment and fine are not required and need not be imposed. These penal sections of the Volstead Act cover the field and would apply to the acts committed by the defendants in the instant case were they indicted under the Volstead Act. Hence the Volstead Act, imposing lighter penalties for the same offenses, must be held to repeal the Revised Statutes.

The Volstead Act is inconsistent with and repugnant to the sections of the Revised Statutes dealing with the liquor traffic in the fundamental and basic public policy which gave rise to each enactment, in that it is a later statute covering the entire subject-matter and in that it imposes lighter penalties for the same offenses, and hence it must be held to repeal the sections of the Revised Statutes.

POINT III.

It is respectfully urged that the judgment of the court below should be affirmed.

Respectfully submitted,

WALTER JEFFREYS CARLIN.

RANSOM H. GILLETT.

(3166)

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 523

THE UNITED STATES OF AMERICA, *Plaintiff in Error,*

v.

BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH.

BRIEF AMICUS CURIAE

On Behalf of Plaintiff in Error.

Agreeable to the permission of the court, this brief is filed to aid in reaching a correct conclusion on the principles of law involved herein.

STATEMENT

This brief is submitted to support the following propositions of law, which are determinative in this case.

Federal and State liquor tax and revenue laws are not repealed by the National Prohibition Act.

Failure to comply with the revenue laws, Sections 3257, 3279, 3281, 3282 et seq., is an indictable offense.

FEDERAL AND STATE LIQUOR TAX AND REVENUE LAWS ARE NOT REPEALED BY THE NATIONAL PROHIBITION ACT.

Section 35 of the Federal Prohibition Code provides as follows:

> "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacturer or traffic of such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax penalty shall give no right to engage in the manufacture or sale of such liquor or relieve anyone from criminal liability, civil or criminal, heretofore or hereafter incurred under existing laws."

In addition, section 35 of the Prohibition Act provides:

> "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

It is further provided in section 9, title 3, of the National Prohibition Act, that the manufacturers of Industrial Alcohol shall be exempt from certain sections of the Internal Revenue Laws, which apply to the making of distilled and vinous liquors. It is manifest from this section that Congress intended that all those who make intoxicating liquor, except Industrial Alcohol, must comply with the regulations in section 9, and all other regulations in the revenue laws. It follows that these laws which must be

complied with are in full force and effect. The only section which could affect this case, even if the defendant was an Industrial Alcohol manufacturer would be section 3279. The manufacturers of Industrial Alcohol must comply with the other sections, 3257, 3281 and 3282, R. S., for which the defendants in this case are indicted for violating the Internal Revenue Laws.

The above sections of the law make clear that Congress intended to retain all of the Revenue Laws and Regulations providing for the manufacture and traffic in intoxicating liquor. Unless Congress did not have authority to enact such provisions the conclusions reached by the district judge are clearly erroneous.

The Court below said, with reference to the Prohibition Act:

"It is intended, as I take it, to cover the entire subject, and in my judgment supersedes and operates as a repeal of the previous act governing the operation of distilleries."

"That it (The National Prohibition Act) is inconsistent with the Revenue Act which provides for the levying of a tax upon distillers and upon the liquor manufacturer at such places."

In other words, the District Judge holds that the Revenue Laws and Regulations are abrogated by the National Prohibition Act. * * *

It has been contended in practically all of these cases relating to the validity of section 35 of the National Prohibition Act, that a law imposing a tax upon the outlawed liquor traffic is void, because the entire beverage liquor traffic is prohibited by the Eighteenth Amendment. This contention is not sound. The courts have uniformly sustained laws levying a tax upon the liquor traffic, even though it is conducted in violation of law.

POWER OF STATE AND FEDERAL GOVERNMENT ON TAXATION

The sovereignty of a State or Nation is said to extend to everything which exists by its own authority, or is introduced by its permission and to be limited accordingly, so that everything over which such sovereign power extends is an object of taxation. Cyc. Vol. 37, Pg. 716.

The power of taxation rests upon necessity, and is an essential and inherent attribute of sovereignty. It is as extensive as the range of subjects over which the power of that Government extends. As to such subjects, and in the absence of constitutional restrictions the power of taxation is practically absolute and unlimited, the only security against an abuse of the power of being found in the structure of the Government itself. Cyc. 37, Pg. 716.

The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and *thus only* it reaches every subject, and may be exercised at discretion. *License Tax Cases* (5 Wall 462.)

TAXES FOR OTHER PURPOSES THAN RAISING REVENUE ONLY, SUSTAINED

In Veazie Bank v. Fenno, 8 Wall, 533, the court sustained a prohibitive and special tax laid on the notes of State banks for the purpose (as well known) of driving them out of circulation. In sustaining its constitutionality this court said (8 Wall 548):

> "It is insisted, however, that the tax in the case before us is so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the

bank, and is therefore beyond the constitutional power of Congress."

"The first answer to this is that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power of tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

In McCray v. United States, 195, U. S., 27, the later act levying a higher tax on oleomargarine was sustained over a very strong showing that it was intended merely to suppress the production of and dealing in oleomargarine and was therefore an interference with the reserved police powers of the states. The reason given by the court was as follows: (195 U. S. 63, 64.)

"As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the state may, in the exertion of their police powers, without violating the due process clause of the 14th Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution.

> From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, * it seems that Congress had, in putting such power in motion, abused its lawful authority by levying tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

Finally, in United States v. Jin Fuey Roy, 241 U. S. 394 (same case decided again by Sup. Ct., December 6, 1920. Question of constitutionality "set at rest" says the court). This court said of the act under consideration:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the district court, in treating these ends as to be reached only through a revenue measure within the limits of a revenue measure, was right." See also U. S. v. Doremus (249 U. S., 86.)

In the case of Youngblood v. Sexton, (32 Michigan, 406) a case involving the right of the State to tax the illegal traffic in liquors, the court used this convincing language:

> "It is enough for him that the government has selected for itself its own subjects for taxation, and prescribed its own rules. It is his liability to taxation at the will of the government that entitles him to protection, and not the circumstances of his being actually taxed. And the taxation of a thing may be, and often is when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed.
>
> "There has undoubtly been felt and expressed a strong sentimental objection to the doing of anything by the State that even seemed to be a lending of its countenance to a business which the objectors

regarded as an evil in itself; especially to the State participating in the profits of a pernicious trade. But the objection never found expression in laws forbidding the taxation of liquors or of the business of dealing in them. Indeed, in this State liquors have always been taxable as property; and so have been the implements by means of which forbidden games of chance have been carried on. Yet when the keeper of billiard tables is compelled to pay a tax, it can be no defense to him, either in law or in morals, that he is compelled to do so from the profits of an illegal business. To refuse to receive the tax under such circumstances would tend to encourage the business, instead of restraining it; and would not only be unwise because it would tend to defeat the State policy which forbids games of chance and hazard.

"This State has never shown any disinclination to make things morally and legally wrong contribute to the public revenue when justice and good morals seemed to require it. If it were to act upon the idea of refusing to derive a revenue from such sources, it ought to decline to receive fines for criminal offenses with the same emphasis that it would refuse to collect a tax from an obnoxious business. If the tax is laid by way of discouragement or regulation, it has the same general object in view with the fine; not only as it affects the person taxed and the community, but also in the use to which the money is devoted. * * * "

In the case of Home Ins. Co. v. Augusta, 50 Ga. 530, the court held:

"The Federal laws give us illustration of the taxation of illegal traffic. A case in point was the taxation of the liquor traffic in this State previous to the repeal of the prohibitory law: the Federal law found a business in existence and it taxed it without undertaking to give it any protection whatever. McGuire v. Com., 3 Wall 387; Pervear v. Com., 5 Wall 475. *What would have prevented the State from taxing the same traffic at the same time? Is it any*

more restricted in the selection of subjects of taxation than the general government is? If one may tax and at the same time refuse to protect may not the other do the same? The only reason suggested for a negative reply to these questions is, that it was the State itself, not the United States, that made the business illegal, and it would be inconsistent and absurb to declare it illegal, and at the same time tax it. But how the inconsistency would appear in one case rather than the other is not apparent. The illegality was declared by competent authority, and yet the Federal Government taxed the trade, at the same time refusing, or being unable to protect it. If protection because of the tax was due to the very thing upon which the tax imposed, there would be an inconsistency in taxing a prohibited trade; but treating taxation, however and wherever it may fall, as the return for the general benefits of government—for the protection of life, liberty, the social and family relations, as well as to business and property—which is the only legal and proper idea of taxation, there is no inconsistency whatever in making a thing which is not protected by one of the measures or standards by which to determnie how much the party owning or supporting it ought to pay the government. IF ONE PUTS THE GOVERNMENT TO SPECIAL INCONVENIENCE AND COST BY KEEPING UP A PROHIBITED TRAFFIC OR MAINTAINING A NUISANCE, THE FACT IS A REASON FOR DISCRIMINATING IN TAXATION AGAINST HIM; AND IF THE TAX IS IMPOSED ON THE THING WHICH IS PROHIBITED OR WHICH CONSTITUTES THE NUISANCE THE TAX LAW, INSTEAD OF BEING INCONSISTENT WITH THE LAW DECLARING THE ILLEGALITY, IS IN ENTIRE HARMONY WITH ITS GENERAL PURPOSE AND MAY SOMETIMES BE EVEN MORE EFFECTUAL. CERTAINLY WHATEVER DISCRIMINATIONS ARE MADE IN TAXATION

OUGHT TO BE IN THE DIRECTION OF MAKING THE HEAVIEST BURDENS FALL UPON THINGS WHICH ARE OBNOXIOUS TO THE PUBLIC INTERESTS WHEREVER THAT IS PRACTICABLE. (CAPITALS OURS.)

This is Judge Cooley speaking in the opinion in the Youngblood case and it will be observed that the hypothetical case given by Judge Cooley is identical in the instant case. The U. S. has prohibited the traffic throughout the nation and under Judge Cooley's reasoning has the right to tax the traffic under the Revenue laws.

Following this last expression of Judge Cooley one can come to no other conclusion than that the law instead of being inconsistent with the Prohibition Amendment is in entire harmony with it and, it tends to effect the same purpose, namely, the prevention of the sale of liquor.

This view is also in accord with that of Judge Minshall on p. 561 in Alder v. Whitbeck, 44 O. St. Supra, where he speaks of the tax as being an impediment to or disapproval of the traffic in liquors.

The last syllabus in Youngblood v. Sexton, 32 Mich. 406 supra, on this point is as follows:

> "A business is not necessarily licensed or protected because of its being taxed, nor does taxing a business imply an approval of it."
> See also pp. 420, 421, 422 and 423.

Judge Cooley also says on this phase of the question in his work on taxation, 3d ed. p. 14, as follows:

> "They privilege taxes—may be intended to discourage trades and occupations which may be useful and important when carried on by a few persons under stringent regulations, but exceedingly mischievous when thrown open to the general public and engaged in by many persons. An example is a

heavy tax imposed in some states, and in some localities in other states on those engaged in the manufacture and sale of intoxicating liquors."

On page 242 of the same work Judge Cooley further says:

"On the other hand, one purpose of taxation sometimes is to discourage a business and perhaps put it out of existence. Then it is taxation without any idea of protection attending the burden. This has been avowedly the purpose in the case of some federal taxes, while in others *the burden has been laid on subjects which by state legislation were put out of the protection of the law. The taxes have nevertheless been sustained.*" (Italics ours.)

In the license tax cases, 5 Wal. 462, cited in Conwell v. Sears, 65 O. St., supra, and Foster v. Speed, 120 Tenn. 470 supra, on p. 472, the Chief Justice rendering the opinion says as follows:

"Nor are we able to see the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the state cannot be taxed by the national government. There would be a great force in it if a license were regarded as giving authority, for then there would be direct conflict between national and state legislation on a subject which the Constitution places under the exclusive control of the states.

"But, as we have already said, these licenses give no authority. They are mere receipts for taxes. * * * * There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the states. What the latter prohibits, the former, if the business is found existing notwithstanding the Prohibition discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be judicial anomaly as singular as indefensible if we should hold violation of the laws of the Union."

In the case of Lyle v. Sears (61 N. E. 155), the court in part held:

> The assessment upon the traffic in intoxicating liquors required by section 43 64-9 of the Revised Statutes is legally and properly made upon that traffic, though it be carried on in violation of a municipal ordinance.

This case has been repeatedly affirmed by the Supreme Court of Ohio. Several attempts have been made since the passage of Prohibition Laws relating to municipalities, counties, and then to the entire State to reopen this question. The court has always been impressed with the reasoning of Judge Shauck, that wherever the traffic exists, the Government has the right to tax it. The fact that it exists in violation of law furnishes no reason why it should be immune from the burden of taxation. It is more costly and more troublesome than any other business, and, if it exists in violation of law and the taxing power can be used to carry out the purpose of the Government, it is not only consistent, but it furnishes an added reason why the Government should make this crime-producing traffic pay for some of the expenses that it causes.

Judge Shauck well said in the Ohio case:

> "We should not assume that the Legislature intended to offer a reward for the violation of local inhibitions in those numerous portions of the State where sentiment against the traffic is strong enough to secure their adoption, but conviction is not strong enough to secure their enforcement."

If a business could be exempt from taxation because it was operating in violation of the law, many trades might be willing in some sections of the country to take their

chances and operate in this manner in order to secure relief from tax laws.

The Congress well knew from its investigation of the beverage liquor traffic under Senate Resolution 307, (See copy of findings of Committee Sept. 5, 1919, Congressional Record. The investigation was made in 1918 and reported to the Senate) that in some places the law would not be rigidly enforced, because of the lawless character of the traffic. In order to make this outlawed trade bear some of the expense it makes, and in order to discourage the trade in such places, the liquor tax laws were retained, and those who were engaged in the trade in violation of the law were made subject to a special or prohibitive tax.

Over $22,000,000 in liquor taxes have been assessed this last year under authority of this Section 35. It has been a revenue and a law enforcement measure combined. As the Supreme Court of Tennessee well said, this tax has been more effective in preventing the traffic in some of these places than the criminal provisions of the law.

This has been the policy of the Government for years. A U. S. revenue tax has been collected on the illegal sale of liquor, and the collection of the tax gave the liquor dealer no right to sell. Section 1001-12 of the Revised Statutes enacted in 1919 provided a $1,000 tax on those who manufactured liquor in violation of State or Local Laws.

In the case of Foster v. Speed, 111 S. W. 925, the court held: a prohibited traffic may be taxed. The reasoning in this case is convincing:

> "The question in this case is whether the statute imposing a tax upon those engaged in that business applies to territory in which the sale of liquor is prohibited by what is commonly known as the "four-mile law." * * *

> "The imposition of a tax upon an outlawed business is often more efficient in suppressing it than statutes making it a criminal offense, because of the greater certainty of the collection of the tax and the difficulties attending to prosecution of the misdemeanor, and the fact that the enforcement of the two remedies is generally intrusted to different officers, as in this case, where the tax is collected by the clerk of the county court and the prosecution of the misdemeanor committed in making the sale made the duty of the sheriff and the district attorney."

In Carpenter v. State, 120 Tenn. 586 also we find this sound conclusion.

"The business of retailing liquors in any part of this state whether it be where they can be lawfully sold or where the sale is prohibited * * is made a privilege and taxed, and anyone engaging in this business although in violation of the latter law is liable for the tax."

In the case of Comm. v. Nickerson 128 N. E. 273, the Supreme Court of Massachusetts upheld the restrictive and prohibitory features of a license law after the 18th Amendment was adopted.

The court said:

> "But aside from that (referring to certain license provisions) other provisions of c. 100 aimed at the suppression of sales of liquor containing more than one per cent of alcohol have a tendency to enforce prohibition of the use of such liquor for beverage purposes. They will be enforced by judicial tribunals of a different sovereignty. They tend toward the same result by harmonious means."

It follows with even greater force that a tax or revenue law is valid, and in perfect harmony with the prohibition Act. The tax does not in any way give any legality to the trade and cannot be considered a protection to it. It is a burden on the traffic and often used as a means to discourage or prevent it.

FAILURE TO COMPLY WITH THE REVENUE LAWS IS AN INDICTABLE OFFENSE

The United States Liquor Tax or Revenue Laws have not been repealed by the enactment of the Volstead Act, as we have heretofore shown. It is contended, however, that, inasmuch as the Eighteenth Amendment and the Volstead Act prevent a liquor dealer from purchasing revenue stamps, or tax receipts, in advance for any illegal manufacture or sale of liquor, the Government has no legal right to prosecute the defendant for failing to do what the law prevents him from doing. The provision of the Volstead Act preventing the issuance of the stamps in advance has little if anything, to do with this question. This section 35 refers to the illegal manufacture or sale. Every person who makes liquor, or sells intoxicating liquor, must comply with certain provisions of the Revenue Laws, even though he makes such intoxicating liquor legally for non-beverage purposes. The failure of any individual to comply with these laws subjects the maker or seller to certain criminal penalties. As long as the law requires certain conditions precedent to be fulfilled before you can make or sell intoxicating liquor, the failure to comply with these conditions may be made an offense, such as is found in Sections 3257, 3279, 3281, 3282, R. S. et seq. If the defendant engages in either the legal or illegal liquor traffic, he is liable for the tax, and must obey certain revenue regulations. If he is to engage in a business not prohibited by the constitution, there is no reason why he should not comply with the Revenue Laws for the control of such business not prohibited.

It is somewhat similiar to the situation in the States which have license laws for, liquors not prohibited by the Federal Law. These States require every liquor dealer

who engages in the making and selling of any kind of malt and vinous liquors to secure a license. The Federal Act prohibits the sale and making of intoxicating liquor, containing ½ of 1 per cent alcohol for beverage purposes, but some of these State Laws require a dealer to take out a license for doing that which the Federal Act and the Eighteenth Amendment does not prohibit.

The Court of Appeals of Maryland, in passing upon this kind of a law, recently held in the case of Ulman v. Maryland (decided Jan. 13, 1921):

> "We have here to deal with the Federal Constitution and an Act of Congress which permit the sale of intoxicating liquor for non-*beverage* purposes, and a state law which prohibits the sale of such liquors without a license for *any* purpose. Certainly there is no conflict so far as the State law applies to sales for non-beverage purposes. Because it permitted the license of sales for beverage purposes also when such sales were not prohibited by the Federal Constitution, and because such licenses can no longer be issued, it does not follow that the whole law has been abrogated. On the contrary it is not unreasonable to suppose the Legislature would have enacted laws regulating the liquor business and providing for a revenue from such sales as would have been permissible if the 18th Amendment had then been in force. One of the ways of exercising control over the business by the State and preventing clandestine and illegal sales, would be to enforce the prohibition feature of the existing license laws, the effect of which would be to punish everyone selling without a license whether for beverage or non-beverage purposes. The inhibition being against *any sale* without a license; all sales are covered, both those permitted and those prohibited by the 18th Amendment. But even if it were probable that the Legislature of Maryland would not have enacted, the existing license laws or any part of them if it could have foreseen the adoption of the 18th Amendment that could

not be taken into consideration in determining the question now before us. Doubtless many statutes would not be enacted if happenings of the future could be foreseen.

"The Legislative intent which is important in reference to the dependence of the validity of one part of a statute upon the validity of another part, relates to conditions as they exist at the time of the passage of the statute and not to those brought about by subsequent events. If a statute is valid in all its parts at the time of enactment, then if conditions subsequently arise which make enforcement of part of the statute impossible, the question becomes, not what the men who made the law would have done if they could have looked into the future, but whether the remaining part of the statute can be enforced without doing violence to the purpose of the whole act; in other words any part of the purpose of the act can be subserved by the enforcement of such part of the statute as has not been nullified."

Section 3247 et seq. of the Revised Statutes relates to the tax on distilled liquors. By section 600, Act of Feb. 24, 1919, it is $2.20 per gallon on non-beverage spirits and $6.40 on beverage spirits. Every person who is a wholesale dealer in intoxicating liquor, manufacturers and wholesale dealers in fermented liquors, (Section 3244, R. S.) must pay a $100 tax.

(Section 18, Act of February 8, 1875 (18 Stat., 309), as amended by Sec. 4, of March 1, 1879 (20 Stat., 327), provides that retail dealers in liquors shall pay twenty-five dollars.

A manufacturer must give a bond in accordance with Title III of the Federal Prohibition Act, and sign an agreement under Regulation 1408 to be liable for all of the taxes. Any person who thus makes, or sells, or transports, intoxicating liquor in violation of the Revenue Laws, is as liable for the penalties provided in the crimi-

nal sections referred to as he was before the adoption of National Prohibition. Liability for failure to comply with the Revenue Laws relating to the legal manufacture of intoxicating liquors is the same today as it was before the adoption of National Prohibition.

In the case of United States v. One Essex Touring Automobile, 266 Fed. 138, the Court said:

> "This section (35) expressly continued the revenue laws in force and is not contrary to the Eighteenth Amendment. That amendment does not prohibit the manufacture, transportation, and sale of intoxicating liquors, for any purpose whatever, but only for beverage purposes. Such liquors may still be made, carried about, and sold for medicinal, sacramental, scientific, and some commercial purposes. The restraints applicable to liquors for such uses do not arise from the amendment, but are justified as reasonable safeguards to prevent the abuse of liberty as to them, and to attain enforcement of the prohibition for beverage purposes. Evidently there is much field left by the amendment for the operation of the revenue laws, which are preserved by section 35. Since that section expressly provides that taxation of illegal acts shall not be had in advance, and that the exaction of the tax afterwards shall not legalize them, there is no contravention, even in spirit, of the prohibitory amendment. The tax operates only as an additional penalty, and tends rather to the enforcement than the defeat of the prohibition scheme.
>
> "It follows, then, that distilled liquors whether produced under permit for lawful purposes or in violation of law, are still "a commodity in respect whereof a tax is imposed," in the language of Rev. St. §3450, and its provisions are applicable to a case within them, unless defeated by inconsistent provisions of the Prohibition Act. The suggestion that repeal was intended because the whole subject of intoxicating liquors was covered is answered by the ex-

press language to the contrary in section 35. Section 26 is not only reconcilable with Rev. St. §3450, but applies to a substantially different subject-matter."

In the case of United States v. Turner, (265) Federal Rep. (249) the court discussed the effect of the Federal Amendment on various Revenue Laws and regulations in reference to section 3296. The Court said:

> "By far the commonest difficulty encountered by the government in prosecutions for removals of liquor under section 3296 is that of proving beyond reasonable doubt that the liquor was untaxed. A recognition of this difficulty and an intent to aid and supplement the old statute by the transporting clause of the Volstead Act seems to me to comport with the chief purpose of the framers of the Volstead Act much better than does an intent to repeal the removal clause of section 3296. Both statutes are useful in preventing the use of intoxicating liquor as a beverage. Neither fully covers the ground; but the two together seem to reach every method of evading the fundamental intent of the Volstead Act, in so far as the movement of liquor is concerned, and the use of intoxicating liquor as a beverage to any considerable extent necessitates movement of liquor."

In the case of United States v. Sohm, 265 F. 910, the Court held that the Internal Revenue laws were not repealed by the Prohibition Act. The Court said:

> "Before the Eighteenth Amendment, prohibiting manufacture of and traffic in "intoxicating liquors * * * for beverage purposes," * * * is an elaborate "code" of federal law governing manufacture of and traffic in distilled spirits and other intoxicating liquors for beverage and other purposes, in the main to provide public revenue. In so far as provisions of this Code apply to and sanction spirits and liquors for beverage purposes only, they are rendered obso-

lete or repealed by the Amendment. Subsequent to the amendment is the National Prohibition Act, to effectuate the amendment and also to govern manufacture and traffic in such spirits and liquors for non-beverage purposes: this latter not only as incidental to prohibition, but also to provide public revenue.

(1) In title 2, § 35, the act expressly provides that "all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws," and in section 9, title 3, the act recognizes the continued existence of many enumerated sections of the Codes, including sections 3258, 3260, and provides these sections shall not apply to industrial alcohol plants only, though the commissioner may so apply them by regulations made by him.

This express repeal in the act renders all rules of implied repeal inapplicable, demonstrates no implied repeal is intended. "Expressio unius," etc. See cases cited in 36 Cyc. 1081, and annual annotations.

(2) It follows that save for clear and unavoidable inconsistencies, both said Code and the act, wherein their terms are applicable to spirits and liquors for non-beverage purposes, are present law, the latter cumulative to the former, however cumbersome and confused the result may be.

It may be observed that, if the act more lightly penalizes an offense identical as in the Code, the latter is repealed by inconsistency.

(3) In the act is nothing forbidding, as does section 3282 of the Code, making a mash fit for the production of spirits on premises other than duly authorized distillery. Hence there is no inconsistency. Section 3282 is not repealed, and the first count of the indictment, based thereon, states a public offense.

It hardly needs to be pointed out that, subject to the act, distilleries will continue to exist and mashes to be made, and now, as before, it is essential the

latter be made only at the former duly authorized. The object of the act requires this as much as did the object of the Code."

(4-5) Section 3, title 2, of the act provides that intoxicating liquor for non-beverage purposes may be manufactured, etc., "only as herein provided." But "only as herein provided," by virtue of section 35, includes the provisions of all consistent existing law, to which the act is but an addition.

So, while said section 3 provides for permits from the commissioner and in form by him prescribed, and for bonds in his discretion and in form by him prescribed, section 3258 of the Code, requiring registration in statutory form with the collector of stills set up and possessed (upon which section is based the second count of the indictment), and section 3260 of the Code, requiring a bond in statutory form (upon which section is based the third count of the indictment), are not inconsistent with the act, are not repealed, and the said counts state public offenses."

In the Windham case, (264 Fed. 376) cited with approval by the court below, and in certain other cases, it was held substantially that, inasmuch as the Volstead Act prohibits the manufacture of distilled spirits for beverage purposes, and, by Title III thereof, provides a new system for the production of industrial alcohol, Section 3258 R. S., and other sections, must be regarded as having nothing left to operate upon, as being, therefore, inconsistent with the Volstead Act and consequently impliedly repealed.

This reasoning would have some weight if Title III covered the production of all non-beverage spirits. The fact is, however, that it covers only alcohol. It does not cover the productions of the potable liquors—brandy, gin, rum, etc. for non-beverage purposes, which is still left to be covered by the old internal revenue system. If

the production of potable liquors for non-beverage purposes was intended to be covered by the old internal revenue system, of course, Sections 3257, 3279, 3281, 3282, R. S., which are a part of that system, must remain in effect.

This disposes of the objection to all cases where the defendant failed to comply with the Revenue Laws relating to the manufacture and sale and transportation of liquor for legal non-beverage use. We submit that such prosecutions lie also for the manufacture and sale of liquors for illegal purposes. It is a well settled policy in the States that a person who makes or sells liquor may be punished for these acts if he does so even illegally. The same person may be punished for making or selling liquor without first having obtained a license. There has never been any question but what the State had the power to lay a liquor tax upon the making and selling of liquor, whether it was done legally, or illegally. If the State may penalize a person who makes or sells liquor without first securing a license, by the same logic the same penalty may be placed upon a person who makes or sells liquor without paying the tax. The argument is even stronger, because the payment of the tax never has in any State, or in the Federal Government given the person who pays the tax any right to sell liquor in violation of any law—Local, State, or Federal.

Section 3243, R. S., provides that the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall

the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

McGuire v. Commonwealth, 3 Wall, 387; License Tax cases, 5 Id., 462; 6 Int. Rev. Rec., 36; affirmed in Pervear v. Commonwealth, 5 Wall. 475.

A special-tax stamp from the Federal Government, under the internal revenue act of Congress, is no bar to an indictment under a State law prohibiting the sale of intoxicating liquors. (Pervear v. Commonwealth, 5 Wall., 475.)

The court in the Windham case and in the court below entirely overlooked the fact that all of the revenue laws remain in full force and effect for the manufacture of distilled liquors for non-beverage purposes, and all of these revenue laws and regulations remain in full force and effect to control the manufacture of industrial alcohol except the sections heretofore mentioned in this brief. It would be an anomalous situation if the regulations controlling the manufacture and distribution of non-beverage liquors were repealed. It would put the illicit manufacture of these liquors at a premium, or, as the Supreme Court said in the Ohio case, it would act as a reward for the violation of Prohibition Laws in those communities where local public sentiment was not strong enough to secure the honest enforcement of the criminal laws. The fundamental error in these cases is that the court assumes that the revenue laws are inconsistent with the Prohibition Act. In order to reach this conclusion, the court must have assumed that these revenue tax laws are license laws, and that they attempt to legalize the sale and manufacture of liquor. This court many years ago made clear the fallacy of this position in the license cases cited supra.

REVENUE LAWS NOT REPEALED BY IMPLICATION

No principle of statutory construction is better settled than the principle that repeals by implication are not favored. The presumption is against them. To work a repeal by implication there must be something more than inconsistency in principle. The inconsistency must be such as to make it impossible for the statutes to exist together. "If both can exist, the repeal by implication will not be adjudged. Johnson v. Browne, 205 U. S. 309, 321; Osborne v. Nicholson, 13 Wallace 654, 662; Wood v. U. S. 16 Peters 342, 363; U. S. v. Gear, 3 Howard 120, 131 U. S. v. Tynon, 11 Wall. 88; Dist. of Col. v. Hutton, 143 U. S. 18; U. S. v. Claffin, 97 U. S. 546; There is no difficulty whatever about Sections 3257-3279, R. S. et. seq., and the Volstead Act existing together. They do not clash in any particular. The offenses which are made punishable by Section 3257, and these other sections in the Revenue Laws are not punishable at all under the Volstead Act. As already shown, the Volstead Act does not cover the entire field of non-beverage spirits production. That which it does not cover is covered by the Internal Revenue laws, including Section 3257 R. S. et. seq. If this section of the revenue laws and the Volstead Act cover different fields of non-beverage spirits production, they are not even inconsistent in principle. Of course, then, these sections are not repealed by the Volstead Act.

That Congress did not intend these revenue laws to be repealed is indicated by the direction in Section 35 of Title II of the Volstead Act; "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor

shall be construed as in addition to existing laws," and by the further direction in Section 3 that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." The intent of Congress is rendered still clearer by the fact that the industrial alcohol plants and bonded warehouses established under the provisions of Title III of the Volstead Act are exempt from the provisions of Section 3279 R. S. Under the rule that the mention of one excludes the other, it must logically follow that Congress, having expressly exempted industrial alcohol from Section 3279 as to the matters coming within Title III, it did not intend to repeal the sections named as to matters not within the scope of this Title. In the face of all this, the inconsistency should be very clear before Section 3279 R. S. should be held repealed by implication. It is in fact very clear that there is no inconsistency between them.

There is no constitutional provision interfering with the continued existence of Section 3279 R. S., or the other section in issue in this case. It is unconstitutional, of course, to punish a person twice for the same offense, but even in the face of this inhibition, it has been held that:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other."

Morey v. Commonwealth, 108 Mass. 433; Carter v. McClaughry, 183 U. S. 365, 395, 22 Sup. Ct. 181, 46 L. Ed. 236; Gravieres v. U. S., 230 U. S. 338, 31 Sup Ct. 421, 45 L. Ed. 489; Ebeling v. Morgan, 237 U. S. 625, 630, 631, 35 Sup. Ct. 710, 59 L. Ed. 1151; U. S. v. Turner, 266 Fed. 248. But the act, or rather failure to act,

which is an offense under Section 3257 R. S., is not punishable at all under the Volstead Act. No offense which the Volstead Act creates is like that created by Sections 3257, 3281 or 3282 R. S. To hold that one repeals the other is like holding a statute dealing with the crime of burglary repeals one dealing with the crime of murder.

Persons who engage in the sale of alcoholic liquor, even though such business is a violation of the law of their State, are nevertheless required to pay special tax under the internal revenue laws of the United States. The stamp, however, issued to them is not a license, and does not protect them from prosecution, conviction and sentence under the State Law. (T. D. 21851; see also T. D. 1484 and T. D. 1826.)

It is true that the revenue stamps cannot be issued in advance for the illegal sale, but this does not relieve the liquor dealer from paying the tax, which he owes to the Government, when he makes or sells the liquor. The only part of the procedure which is changed by Section 35 of the Volstead Act is that the stamps cannot be issued in advance. This was provided in order to deny liquor dealers the imaginary protection which the revenue stamp gives when it is placed upon a liquor container. If a liquor dealer went to the Revenue Office and tendered the amount of the tax upon certain liquors which he had made or sold and the Government refused to receive the tax, there would be some basis for the contention that he had complied with the law as far as he was able to do so. The situation is similar to that which the liquor dealers faced before National Prohibition. Under Section 3240 of the Revised Statutes of the United States made the fact that a dealer paid the Revenue tax prima facie evidence of sale, and a provision was made for securing a certified copy to be used in the criminal

court to convict the holder for violating the Criminal Laws. The denial of the right to receive the revenue stamp in advance does not relieve the illegal liquor dealer of his responsibility to pay the tax upon liquors when he does make or sell such liquors subject to tax. It is not sound reasoning, therefore, to say that, because a liquor dealer is prohibited from making or selling liquor, he cannot be prosecuted under a law which makes it an offense for him to engage in this business without having paid the tax imposed upon him by the Revenue Laws.

The Prohibition Act and the revenue laws supplement each other and work to a common end. What the criminal sections fail to completely prohibit, the tax sections discourage by a heavy tax. The payment of the tax gives no legal right to sell, but on the other hand is used as evidence to convict the offender for violating the sections making the act a crime.

The tax is collected just as the liquor taxes always have been collected. The penal sections and abatement proceedings are enforced as provided in the act.

The National Prohibition Act for good and valid reasons includes the criminal, equity and taxing power of the Government to carry out its expressed purpose "to prevent the use of intoxicating liquor as a beverage."

That Congress had the power to do this is no longer called into question. Inasmuch as the Congress has specifically retained all the revenue laws, we respectfully submit that the law should be construed as to carry out the purpose of the act, and therefore the decisions of the lower court should be reversed.

Respectfully submitted,

WAYNE B. WHEELER,

Amicus Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 523.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, DEFENDANTS IN ERROR.

REPLY BRIEF FOR DEFENDANTS IN ERROR.

The brief submitted by the Government and the brief submitted by the *"amicus curiæ"* entirely miss the point involved in this appeal.

The defendants are charged in the indictment with failure to pay the tax imposed by the internal revenue laws on the manufacture of intoxicating liquor; but whether this liquor was to be used for beverage or non-beverage purposes, the indictment does not state.

Both the Government and the *"amicus curiæ"* strenuously (and, we concede, rightly) contend that under certain sections of the National Prohibition Act intoxicating liquor may be lawfully manufactured for non-beverage purposes; and that such manufacture is a proper object for taxation (which we also concede); and that the amount of that tax, the method of its collection and the penalties for not paying it, all are prescribed in the internal revenue laws (which is the fact).

Whereupon the Government argues that the manufacture of all kinds of intoxicating liquor—whether for beverage or non-beverage purposes—is a violation of the internal revenue laws and may be punished under their provisions; entirely disregarding the fact that the manufacturing of intoxicating liquor for beverage purposes is prohibited by a constitutional provision and cannot possibly be a lawful and taxable occupation.

If these defendants were engaged in manufacturing intoxicating liquors for non-beverage purposes without paying the tax and complying with the other provisions of the Revenue Laws, they are guilty of the crime of not paying the tax imposed on that industry as well as failure to observe the other laws regulating that industry. But that crime is not charged in the indictment; for no mention is made therein as to whether the alleged distilling or the place where these acts are alleged to have been accomplished were any or either or all of them used or committed for the purpose of or in the act of distilling intoxicating liquor for non-beverage purposes. (Transcript of Record, pp. 3 and 4.)

If on the other hand they distilled this intoxicating liquor

or beverage purposes, and failed to pay the tax on it (even conceding the Government's contention that such a tax may be levied in spite of the Constitutional prohibition), a different crime was committed; a new and distinct criminal element aside from the non-payment of the tax was an integral part of the act and the indictment is bad in that either that criminal element nor that criminal act is charged.

> "With rare exceptions offences consist of more than one ingredient and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment or the indictment will be bad and may be quashed on motion." U. S. *v.* Cook, 17 Wall., at p. 174.

The Government cannot deny that there are now two distinct elements of criminality present in the unlawful manufacture of intoxicating liquor:

The one, the crime committed by the failure to pay the tax imposed upon the manufacture of intoxicating liquor for non-beverage purposes;

The other, the crime of manufacturing liquor for beverage purposes in contravention of the express constitutional and statutory prohibitions, whether the tax is paid or not.

> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him and the court must be able to decide whether the property taken was such as was the subject of larceny." U. S. *v.*

Cruikshank, 92 U. S., pp. 557, 558; 22 Cyc., p. 295, par. 2, and cases there cited.

These defendants are charged in the indictment with failing to pay the tax imposed upon the business of distilling intoxicating liquor and with the failure to observe certain provisions of law applicable to that industry.

A complete answer to the indictment is that it does not charge a crime:

1st. Because it is not stated in the indictment whether the liquor alleged to have been distilled or manufactured was so distilled or manufactured for non-beverage or beverage purposes; and these defendants have the right to know for what specific crime they are being prosecuted.

2nd. Assuming, as the Government does assume, that they are being prosecuted for not paying a tax on the occupation of distilling intoxicating liquor for beverage purposes, it is respectfully submitted that the Congress cannot tax an occupation or industry the very existence of which is forbidden by the terms of the Constitution from which Congress derives the power to tax at all.

As well say that Congress could authorize by law the taking of private property without due process of law and then impose a tax upon this privilege of such an amount as to make it impossible for citizens to engage in the industry, because they could not pay the tax and make a profit on the business.

Or permit a State to quarter State troops on inhabitants in the District of Columbia or the Philippine Islands in times of peace and then impose a prohibitory tax on the privilege.

The Government and the *"amicus curiæ"* apply the rules

of law applicable to statutory construction in their argument to sustain the contention that the National Prohibition Act and the Internal Revenue laws are not inconsistent and that, therefore, the punitive provisions of the Internal Revenue laws may be invoked to punish a person who violates the provisions of the National Prohibition Act.

The logic is unsound and the cases relied upon to sustain it are clearly distinguishable and do not apply to this situation.

Youngblood *v.* Sexton, 32 Mich., 406, cited at page 8 of the Government's brief, and page 6 of the brief submitted by the *"amicus curiæ"* was a case wherein the act, subject to the tax, was forbidden by statute—that is, it was an act *"malum prohibitum"* and not *"malum in se."*

The situation is exactly the same in the cases of Foster *v.* Speed, 120 Term., 470 (cited Govt. Brief, p. 17); Conwell *v.* Sears, 65 Ohio State, 49 (cited Govt. Brief, p. 8), and in every other case cited.

They are "local option" cases—the question of constitutional prohibition does not enter into the situations therein considered at all.

The language of section 35 of the National Prohibition Act is not conclusive on the question of the repeal or implied repeal of the Internal Revenue laws.

That question is purely judicial and not legislative; and the legislative branch of the Government cannot interfere with nor restrict by the language of the statute in question the judicial branch in interpreting and declaring what the law is or has been.

Ogden *v.* Blackledge, 2 Cranch, 272, p. 277.

Kosh Konong *v.* Burton, 104 U. S., 668, p. 678.

There is a fundamental difference between a constitutional limitation upon the power of a legislature and a constitutional inhibition upon that power.

We earnestly contend that the 18th Amendment to the Constitution of the United States takes away from Congress the power to tax the distillation of intoxicating liquors for beverage purposes.

Such being the case the Congress cannot enact nor the Executive continue to enforce laws which will punish a defendant for not paying a tax the Congress has no right to levy and we respectfully submit that the judgment of the lower court should be affirmed.

All of which is respectfully submitted.

RANSOM HOOKER GILLETT,
Of Counsel.

UNITED STATES *v.* YUGINOVICH ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 523. Argued March 10, 1921.—Decided June 1, 1921.

1. Congress, under the taxing power, may tax intoxicating liquors, notwithstanding their production is prohibited; and the fact that it does so for a moral end as well as to raise revenue is not a constitutional objection. P. 462.
2. Section 3257 of the Revised Statutes, which, for the purpose of protecting the revenues, made it an offense for a distiller to defraud, or attempt to defraud, the United States of a tax on the spirits distilled by him, and penalized the offense by forfeiture of the distillery, etc., and heavy fine and imprisonment, was superseded as respects persons manufacturing spirits for beverage purposes, by § 35, Title II, of the National Prohibition Law, which imposes a double tax and an additional penalty of $500 or $1,000 only, thus covering practically the same acts and inflicting a lighter penalty. P. 463.
3. The repealing effect of this section of the later act is determined in full recognition of its declaration that the act shall not "relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws," but in the light also of settled principles governing the construction of penal statutes, the Eighteenth Amendment, and the provisions of the act itself making unlawful the possession of intoxicating liquors, or property designed for the manufacture thereof, and providing for their destruction. P. 463.
4. Section 3279 of the Revised Statutes, requiring distillers of spirits to exhibit a sign "Registered Distillery" and punishing violations by fine, § 3281, making it an offense, punishable by fine and imprisonment, to carry on the business of a distiller without giving bond, and § 3282, punishing in like manner the making of mash in any building other than a distillery authorized by law, were also superseded by the National Prohibition Law, in so far as concerns the production of intoxicating liquor for beverage purposes. P. 464.

266 Fed. Rep. 746, affirmed.

450. Argument for the United States.

ERROR to review a judgment of the District Court sustaining a motion to quash, and a demurrer to, an indictment. The facts are stated in the opinion, *post*, 457.

Mrs. Annette Abbott Adams, Assistant Attorney General, with whom *Mr. Leonard B. Zeisler*, Special Assistant to the Attorney General, was on the brief, for the United States:

The revenue laws can be said to be inconsistent with the National Prohibition Act only in so far as they interfere with its enforcement. In so far as their enforcement is an aid to the enforcement of the National Prohibition Act, it cannot be said in the face of the express provision of Title II, § 35, that the latter act repeals them.

It has frequently been ruled that there is no inconsistency between taxing an article and prohibiting its production entirely. *License Tax Cases*, 5 Wall. 462; *Foster* v. *Speed*, 120 Tennessee, 470; Cooley on Taxation, 3d ed., p. 14; *Youngblood* v. *Sexton*, 32 Michigan, 406; *Conwell* v. *Sears*, 65 Ohio St. 49; *State* v. *Moeling*, 129 La. Ann. 204; *Carpenter* v. *State*, 120 Tennessee, 586; *Webster* v. *Commonwealth*, 89 Virginia, 154; *State* v. *Smiley*, 101 N. Car. 709; *State* v. *Smith*, 126 N. Car. 1057; *Commonwealth* v. *Nickerson*, 236 Massachusetts, 281.

Applying the principle of these cases to the case at bar, it is clear that the provision of Title II, § 35, of the National Prohibition Act, that the act shall not relieve anyone from paying the internal revenue tax imposed upon distilled spirits, should be construed to mean that the tax must be paid upon such spirits even though they are distilled without a permit. That is its literal meaning and the one best calculated to effect the purposes of the act. In view of the provision of Title II, § 3, that "all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage

may be prevented," that is the construction which must be adopted.

The purpose of the provision that "upon evidence of such illegal manufacture or sale the tax shall be assessed against and collected from the person responsible for such illegal manufacture or sale, in double the amount now provided by law," is merely to confer upon the Commissioner of Internal Revenue that power to assess taxes where they have not been paid in the manner provided by law, which was conferred upon him by Rev. Stats., § 3182, generally, and by Rev. Stats., § 3253, where distilled spirits are removed from the place where they were distilled without paying the tax upon them and without being deposited in a bonded warehouse. This power does not come into existence until after the distiller has failed to perform his duty with regard to paying the tax on distilled spirits as defined by other laws.

But the National Prohibition Act contains no provision as to the amount of the tax, nor how it shall be assessed, nor how or when it shall be paid, nor any measures to prevent its evasion. It is obvious, therefore, that for direction on all these matters the revenue laws must be looked to. If the tax is not paid when it is due, the United States is defrauded and the distillers subjected to the penalties provided in Rev. Stats., § 3257.

The prevention of the secret distillation of spirits is as necessary to the prevention of their distillation without a permit as it is to prevent the evasion of the government tax on such spirits, and measures calculated to prevent such secret distillation do not interfere with but, on the contrary, are of material assistance in carrying out the purpose of the National Prohibition Act. It will not be contended that the sections here involved are actually inconsistent with any of its provisions. The failure of the National Prohibition Act to provide any means of preventing the evasion of the tax which

under its terms is imposed upon distilled spirits shows that they were intended to be continued in force.

It may be argued, however, that although the revenue laws are not actually inconsistent with the National Prohibition Act, they are repealed by it because it covers the whole subject-matter of the revenue laws and contains provisions plainly showing that it was intended as a substitute for those laws.

This contention is clearly unsound. The National Prohibition Act does not provide a substitute for the system of government supervision of the production of distilled spirits established under the revenue laws. The only change which it makes in that respect is that since the act came into effect no distilled spirits can be produced at all except when authorized by a permit issued by the Commissioner of Internal Revenue, and then only in accordance with regulations prescribed by him and by other provisions of the act, none of which are in conflict with the provisions of the revenue laws. This is a necessary deduction from the fact that under the National Prohibition Act all distilled spirits, whether produced with or without a permit, are subject to an internal revenue tax.

Since the act expresses the extent to which it was intended to repeal prior laws, the rule that, where a later act covers the same subject-matter as a prior one, it operates as an implied repeal of such prior act, would have no application, even if the National Prohibition Act did cover the same subject-matter as the revenue laws. *United States* v. *Claflin*, 97 U. S. 546; *Henderson's Tobacco*, 11 Wall. 652; *Great Northern Ry. Co.* v. *United States*, 155 Fed. Rep. 945, 953, affd. 208 U. S. 452.

It may be argued, however, that although the provisions of the revenue laws are not actually inconsistent with those of the National Prohibition Act, an intention to repeal the former must be presumed because the

penalties embraced by the later statute are lighter than those imposed by the earlier one for the same offenses. But this presumption applies only where the offenses denounced by both statutes are the same. It does not apply if each offense embraces an element not embraced in the other, as is the case here.

It is true that under some circumstances the same act may constitute a violation of both statutes, but since the offenses denounced by the revenue laws are not the same as those denounced by the National Prohibition Act, a person committing such an act may be prosecuted under both statutes. *Carter* v. *McClaughry*, 183 U. S. 365, 394; *Gavieres* v. *United States*, 220 U. S. 338; *Ebeling* v. *Morgan*, 237 U. S. 625.

The act shows clearly the intention that a prosecution under it should not be a bar to prosecution for the same act if that act also constitutes an offense under the revenue laws, for it provides in Title II, § 35, "Nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

The decisions of the lower federal courts sustain the Government's contentions. *United States* v. *Sohm*, 265 Fed. Rep. 910; *United States* v. *One Essex Touring Automobile*, 266 Fed. Rep. 138; *United States* v. *Turner*, 266 Fed. Rep. 248. *Contra: United States* v. *Windham*, 264 Fed. Rep. 376; *United States* v. *Puhac*, 268 Fed. Rep. 392; *United States* v. *Stafoff*, 268 Fed. Rep. 417.

Mr. Ransom H. Gillett, with whom *Mr. Barnet Goldstein* and *Mr. Walter Jeffreys Carlin* were on the brief, for defendants in error:

Sections 3257, 3279, 3281, and 3282, Rev. Stats., are contrary to the Constitution as amended by the Eighteenth Amendment. The revenue laws are for the purpose of aiding the collection of the government revenue and

taxes. *United States* v. *Hill*, 123 U. S. 681, 686; *United States* v. *Howell*, 20 Fed. Rep. 718, 719; *Hutton* v. *Terrill*, 255 Fed. Rep. 860, 862. These sections, therefore, are not penal statutes intended to punish violations of a statute or the Constitution, but are mere means to assure the payment of taxes imposed in other sections of the same acts upon lawful and constitutional enterprises. *Edwards* v. *Wabash Ry. Co.*, 264 Fed. Rep. 610.

The constitutional policy of the United States on the liquor question is now shown by the Eighteenth Amendment, and these taxing statutes passed fifty years ago cannot be continued in opposition to that policy. *License Tax Cases*, 5 Wall. 462, 474; *Knowlton* v. *Moore*, 178 U. S. 41, 61. "Subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation." *Knowlton* v. *Moore*, *supra*. Certainly the power does not extend to acts prohibited by the Constitution itself. The acts for which a tax is sought to be imposed and collected from the defendants are acts forbidden by the Constitution and made criminal by a statute passed to carry into effect the constitutional provision. While this court has never passed directly upon the proposition of laying a tax upon crime, it is a fundamental principle of morality and justice, no less than an indispensable requirement of a sound public policy, that Congress cannot lay a tax and attempt to collect a revenue from an act that is forbidden by the Constitution. See *License Tax Cases*, *supra*, 469; *People* v. *Raynes*, 3 California, 366.

The enforcement provisions of § 5, Title I, and § 28, Title II, of the National Prohibition Act, merely confer the power to use existing governmental agencies formerly used to enforce laws now repealed. The intent of Congress was simply to turn over to the proper officers to enforce the new law the machinery built up in enforcing the prior law, and this fact in itself is an indication of the

legislative intent to repeal existing laws designed to enforce payment of a tax.

Section 35 of Title II, furnishes no authority for holding that the revenue laws affecting the manufacture of intoxicating liquors are not repealed by the constitutional provision. That section provides that it "shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." "Such liquor" means liquor the manufacture and sale of which is permitted by the act, *i. e.*, liquor for non-beverage purposes and wine for sacramental purposes. The clause providing that "all provisions of law that are inconsistent" with the act are repealed, expressly repeals the sections of the Revised Statutes here in question. Those sections provide for a license for and a tax on the manufacture of that kind of liquor the manufacture of which is forbidden by the act itself, and hence are provisions of law "inconsistent" with the National Prohibition Act.

When Congress seeks to superimpose upon the punishment for violation of the National Prohibition Act the additional punishment it heretofore had imposed for violation of the internal revenue laws, it clearly has exceeded its powers and infringed the constitutional rights of citizens under the Fifth and Sixth Amendments.

The sections of the Revised Statutes relating to intoxicating liquors were repealed by the National Prohibition Act. With the adoption of the Eighteenth Amendment the public policy of the Nation changed and the liquor traffic became in itself an illegal and improper business. The National Prohibition Act was passed in furtherance of this changed public policy; it was intended to provide a complete system, in and of itself, for the regulation of intoxicating liquors for beverage and non-beverage purposes. Under these circumstances the well-known rule of implied repeal of statutes must be

applied. 22 Cyc. 1606; *United States* v. *Ranlett*, 172 U. S. 133, 140, 141; *Daviess* v. *Fairbairn*, 3 How. 636; *New Jersey Steamboat Co.* v. *The Collector*, 18 Wall. 478; *Henderson's Tobacco*, 11 Wall. 652, 657; *United States* v. *Barr*, 24 Fed. Cas. 1016, 1017; *United States* v. *Cheeseman*, 25 Fed. Cas. 416; *Rogers* v. *Nashville &c. Ry. Co.*, 91 Fed. Rep. 299, 323.

The National Prohibition Act is a penal, regulatory, and prohibitive statute. The Revised Statutes, *supra*, are tax and revenue statutes pure and simple. There is a basic repugnancy that cannot be overcome, and even the attempted saving clause of the National Prohibition Act is not sufficient to prevent the application of the well-settled rules of law.

The National Prohibition Act also comes within the rule that a statute covering the whole subject-matter of a former one, adding offenses and varying the procedure, operates, not cumulatively, but by way of substitution, and impliedly repeals the former. *United States* v. *Claflin*, 97 U. S. 546, 551; *Norris* v. *Crocker*, 13 How. 429, 438.

In this connection the rule of clemency has application. A subsequent statute imposing milder penalties impliedly repeals any former act on the subject. *Smith* v. *State*, 1 Stew. 506; *State* v. *Whitworth*, 8 Port. 434; *People* v. *Tisdale*, 57 California, 104; *Hayes* v. *State*, 55 Indiana, 99; *United States* v. *Windham*, 264 Fed. Rep. 376. In every instance, the penalties for violations set forth in the National Prohibition Act are not as severe as those contained in the Revised Statutes.

Mr. Wayne B. Wheeler, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here under the Criminal Appeals Act. 34 Stat. 1246. The indictment is in four counts.

The first count, based on § 3257 of the Revised Statutes, 6 Comp. Stats., § 5993, charges the defendants with unlawfully engaging in the business of distillers within the intent and meaning of the internal revenue laws of the United States; and that in fact they did distill spirits subject to the internal revenue tax imposed by the laws of the United States; and did defraud and attempt to defraud the United States of the tax on said spirits. The second count, based on § 3279 of the Revised Statutes, 6 Comp. Stats., § 6019, charges that the defendants failed to keep on the distillery, conducted by them, any sign exhibiting the name or firm of the distiller, with the words "Registered Distillery," as required by statute. The third count, based on § 3281 of the Revised Statutes, 6 Comp. Stats., § 6021, charges the defendants with carrying on the business of distilling within the intent and meaning of the internal revenue laws of the United States without giving the bond required by law. The fourth count, based on § 3282 of the Revised Statutes, 6 Comp. Stats., § 6022, charges the defendants with unlawfully making a mash, fit for distillation, in a building not a distillery duly authorized by law.

The defendants interposed a motion to quash the indictment upon the grounds that the acts of Congress under which the same was found were repealed before the finding of the indictment, and that the acts charged to have been committed by them were after the date upon which the Eighteenth Amendment to the Federal Constitution and the Volstead Act became effective. Defendants also filed a demurrer to the indictment on practically the same grounds. The motion to quash and the demurrer were sustained by the District Court. 266 Fed. Rep. 746.

The sections of the Revised Statutes may be summarized as follows: Section 3257 makes it an offense to defraud or attempt to defraud the United States of a tax

upon spirits distilled by one carrying on the business of a distiller; provides for forfeiting the distillery and the distilling apparatus and all spirits found in the distillery or on the distillery premises, and subjects the offender to a fine of not less than $500 or more than $5,000, and imprisonment of not less than six months or more than three years. Section 3279 requires distillers to exhibit on the outside of their place of business a sign with the words: "Registered Distillery." A violation of this section subjects the offender to a fine of $500. Section 3281 makes it an offense to carry on the business of a distiller without having given bond. For such offense the penalty is a fine from $1,000 to $5,000 and imprisonment not less than six months or more than two years. Section 3282 makes it penal to make or permit mash to be made in any building other than a distillery authorized by law. A violation of this section subjects the offender to a fine of not less than $500 or more than $5,000, and imprisonment of not less than six months or more than two years.

These statutes have long been part of the federal internal revenue legislation, and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. At the time of their enactment it was legal, so far as the Federal Government was concerned, to manufacture and sell ardent spirits for beverage purposes. The Government derived large revenue from taxing the business, which it sought to realize and protect by the system of laws of which the sections in question were a part. This policy was radically changed by the adoption of the Eighteenth Amendment to the Federal Constitution, and the enactment of legislation to make the Amendment effective. The Eighteenth Amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States for

beverage purposes, and confers upon Congress the power to enforce the Amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act. 41 Stat. 305. It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes.

Before taking up the sections of the Revised Statutes, some provisions of the Volstead Act may be appropriately referred to. Section 3, Title II, provides that after the Eighteenth Amendment to the Constitution of the United States goes into effect it shall be illegal to manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in the act. Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as in the act provided, and the Commissioner of Internal Revenue may issue permits therefor. The act contains many provisions to make effective the purposes declared in § 3. Section 25 makes it unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violation of the act, or which has been so used, and provides that no property rights shall exist in any such liquor or property. The same section provides for the issue of search warrants, and if it be found that any liquor or property is unlawfully held or possessed, or has been unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor shall be destroyed, unless the court otherwise orders. Section 29 provides that any person who manufactures or sells liquor in violation of Title II of the act shall for a first offense be fined not more than $1,000, or be imprisoned not exceeding six months, and for a second or subsequent offense shall be fined

not less than $200 nor more than $2,000 and be imprisoned for not less than one month nor more than five years.

In Title III elaborate provision is made for the production of alcohol in industrial alcohol plants. It provides for the taxation of such alcohol, and excepts industrial alcohol plants and bonded warehouses for the storage and distribution of industrial alcohol from certain sections of the Revised Statutes.

It is well settled that in cases of this character the construction or sufficiency of the indictment is not brought before us. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Stevenson*, 215 U. S. 190. For the purpose of interpreting the statute we adopt the meaning placed upon the indictment by the court below. *United States* v. *Colgate & Co.*, 250 U. S. 300. As that court evidently construed the statutes upon the assumption that the charges had relation to intoxicating liquors intended for beverage purposes, we shall follow that view of the indictment in determining whether the former statutes are still in force.

Section 35 [1] (in the margin) in its first sentence repeals

[1] Sec. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws. The commissioner, with the approval

all prior acts to the extent of their inconsistency with the National Prohibition Act, to that extent and no more, and provides that no revenue stamps, or tax receipts, shall be issued in advance for the illegal manufacture or sale of intoxicating liquors, and that upon evidence of such illegal manufacture or sale the tax shall be assessed in double the amount now provided by law, with an additional penalty of $500 as to retail dealers and $1,000 as to manufacturers, and that the payment of such tax or penalty shall not give the right to engage in the manufacture or sale of such liquors, or relieve anyone from criminal liability.

That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment. *License Tax Cases*, 5 Wall. 462, 471; *In re Kollock*, 165 U. S. 526, 536; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *United States* v. *Doremus*, 249 U. S. 86. The question remains, concerning the applicability of § 3257, involving the right to punish for attempting to defraud the United States of a tax, Did Congress intend to punish such violation of law by imposing the old penalty denounced

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of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in a court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

This section has given rise to different constructions in the federal courts; in some it has been held that the National Prohibition Act has repealed the old revenue laws. *United States* v. *Windham*, 264 Fed. Rep. 376; *United States* v. *Puhac*, 268 Fed. Rep. 392; *United States* v. *Stafoff*, 268 Fed. Rep. 417; *Reed* v. *Thurmond* (C. C. A. 4th Circuit), 269 Fed. Rep. 252. *Contra: United States* v. *Sohm*, 265 Fed. Rep. 910; *United States* v. *Turner*, 266 Fed. Rep. 248; *United States* v. *Farhat*, 269 Fed. Rep. 33.

in § 3257 or as provided in the new and special provision enacted in the Volstead Act?

It is the contention of the Government that § 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes: ". . . nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States* v. *Tynen*, 11 Wall. 88. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty. The concluding phrase of § 35 by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the Eighteenth Amendment and in view of the provisions of the Volstead Act intended to make that Amendment effective.

Having in mind these principles and considering now the first count of the indictment charging an attempt to defraud and actually defrauding the Government of the revenue tax, we do not believe that the general language used at the close of § 35 evidences the intention of Congress to inflict for such an offense the punishment provided in § 3257 with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under § 35 enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers. Moreover, the concluding words of the first paragraph of § 35, as to all the offenses charged, must

be read in the light of established legal principles governing interpretation of statutes, and in view of the provisions of the Volstead Act itself making it unlawful to possess intoxicating liquor for beverage purposes, or property designed for the manufacture of such liquor, and providing for their destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in § 3257 in addition to the specific provision for punishment made in the Volstead Act.

We have less difficulty with the other sections of the prior revenue legislation under which the charges, already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words "Registered Distillery" in a place intended for the production of liquor for beverage purposes which could no longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law.

The questions before us solely concern the construction of the statutes involved, under an indictment pertaining to the production of liquor for beverage purposes, and we think they were correctly answered in the opinion of the court below. It follows that its judgment is

Affirmed.